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The Paradox of the Obamacare Decision: How Can the Federal Government have Limited Unlimited Power?

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THE PARADOX OF THE OBAMACARE DECISION: HOW CAN
THE FEDERAL GOVERNMENT HAVE LIMITED UNLIMITED
POWER?

*Robert J. Pushaw, Jr.**

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* James Wilson Endowed Professor, Pepperdine University School of Law. J.D., Yale Law School, 1988. This paper benefitted greatly from comments I received at two conferences. The first was a panel discussion on the Supreme Court at the University of California-Irvine Law School in July 2012. The second was a Federalist Society/Templeton Fund colloquium, "Limited Federal Power and the Commerce Clause," held in Las Vegas in January 2013.

INTRODUCTION

National Federation of Independent Business v. Sebelius,¹ the Supreme Court's decision upholding the landmark Patient Protection and Affordable Care Act (ACA or "Obamacare"),² sets forth the most important judicial examination of constitutional power since the New Deal era. The political and media frenzy over the Obamacare case has obscured its actual legal analysis and larger constitutional implications, which warrant more reflective study. This Article seeks to provide such a scholarly perspective.

My starting point is the ACA, which has three key provisions. First, it requires "guaranteed issue" of health insurance to all applicants and "community rating" to prevent insurance companies from varying the price of policies to account for individual characteristics such as pre-existing medical conditions.³ Second, the ACA imposes an "Individual Mandate" (IM): Uninsured Americans "shall" obtain "minimum essential coverage" and, if they fail to meet this "individual responsibility requirement," must pay a "penalty" to the Internal Revenue Service.⁴ Third, Obamacare dramatically expands Medicaid to millions of new recipients by requiring states to either provide health care to all of their low-income citizens or lose their current federal Medicaid funding.⁵

The Court splintered in determining whether Congress could validly enact the ACA as an exercise of its Article I powers to "regulate Commerce . . . among the several States," to "make all Laws which shall be necessary and proper for carrying into Execution [its delegated] Powers," to "lay and collect Taxes," and to spend "for the . . . general Welfare."⁶ Only Chief Justice John Roberts was in the majority on each of the Court's holdings.

Initially, he and his four fellow Republicans (Justices Scalia, Kennedy, Thomas, and Alito) concluded that the IM could not be sustained under the Commerce Clause, which authorized Congress to

1. 132 S. Ct. 2566 (2012).

2. Pub. L. No. 111-148, 124 Stat. 119 (2010) [hereinafter ACA], *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

3. *See* ACA, 42 U.S.C. § 300gg(a)(1) (2012); *Nat'l Fed'n*, 132 S. Ct. at 2585.

4. ACA, 26 U.S.C. § 5000A. The IM targets millions of younger and healthier people who otherwise would not buy insurance unless they became seriously ill or injured, at which point they would be assured coverage—a scenario that would result in massive cost shifting to those who had always kept up their policies. *See* ACA, 42 U.S.C. § 18091(2)(F) (congressional findings).

5. ACA, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (extending coverage to all citizens whose income falls below 133% of the federal poverty line); *id.* § 1396c (allowing the executive to withhold all Medicaid payments to a state not in compliance), *invalidated by Nat'l Fed'n*, 132 S. Ct. 2566.

6. U.S. CONST. art. I, § 8, cls. 1, 3, 18.

regulate existing interstate commercial activity—not to compel Americans who were not engaged in such activity to buy an unwanted product.⁷ Furthermore, the majority would not permit Congress to circumvent that restriction by relying upon the Necessary and Proper Clause because the IM was not a “proper” means of effectuating the Commerce Clause, since the mandate undercut the Constitution’s structure (particularly the core principle that the federal government is limited to its enumerated powers).⁸

Surprisingly, the Chief Justice then agreed with the four liberal Justices (Ginsburg, Breyer, Sotomayor, and Kagan) that the IM could reasonably be interpreted as a “tax” on those who decide to forego health insurance.⁹ This statutory construction enabled the Court to salvage the IM as a valid exercise of the Taxing Power.¹⁰

Finally, Chief Justice Roberts joined with the four conservatives, as well as Justices Breyer and Kagan, to hold that Congress had exceeded its power under the Spending Clause by coercing the States to comply with the Medicaid expansion, because they could not realistically choose to forfeit all of their existing Medicaid funding.¹¹ Nonetheless, Chief Justice Roberts sided with the four liberals in allowing Congress to offer the states a fresh supply of money to encourage them to voluntarily abide by the new ACA conditions.¹²

National Federation could have major ramifications for constitutional law.¹³ Most notably, the Court has spawned confusion about the Federalism Principle: that the Constitution reserves all powers to the States or the People, except for certain enumerated powers

7. *Nat’l Fed’n*, 132 S. Ct. at 2585–93 (Roberts, C.J.); *accord id.* at 2643–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

8. *Id.* at 2592–93 (Roberts, C.J.); *accord id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

9. *Id.* at 2593–601 (Roberts, C.J.); *accord id.* at 2629 (Ginsburg, J., concurring in part, dissenting in part).

10. *Id.* at 2593–601 (Roberts, C.J.); *accord id.* at 2629 (Ginsburg, J., concurring in part, dissenting in part). The Court followed the taxation analysis that had previously been laid out in Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195 (2012).

11. *Nat’l Fed’n*, 132 S. Ct. at 2601–08 (Roberts, C.J.); *accord id.* at 2656–67 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

12. *Id.* at 2607–08 (Roberts, C.J.); *accord id.* at 2630–31, 2641–42 (Ginsburg, J., concurring in part, dissenting in part). *But see id.* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (arguing that (1) the Medicaid expansion and the IM were so integral to the ACA that the entire statute should have been struck down, and (2) the Court was rewriting the law by giving states the option to follow the ACA if Congress provided new funds).

13. *National Federation* will have “repercussions for legal doctrines and for the actual scope of governmental powers for years to come.” Martha Minow, *Affordable Convergence: “Reasonable Interpretation” and the Affordable Care Act*, 126 HARV. L. REV. 117, 119 (2012).

entrusted to the United States Government.¹⁴ On the one hand, Chief Justice Roberts and the four dissenters began their opinions with eloquent summaries of the Federalism Principle¹⁵ and repeatedly emphasized it to justify curbing Congress's power under the Commerce, Necessary and Proper, and Spending Clauses.¹⁶ On the other hand, the Chief Justice abandoned federalism by allowing Congress to achieve its desired goal under the Taxing Power,¹⁷ which has not been subjected to any meaningful restrictions since 1937.¹⁸ This result was especially puzzling because Congress explicitly declared that the IM was not a "tax," but rather was a "penalty" for violating the new legal requirement—enacted pursuant to the Commerce Clause—to purchase health insurance.¹⁹ The majority's creative interpretation of the ACA as a "tax" neutered the only restraint on the Taxing Power: the political reality that voters will not tolerate taxes above a certain level.²⁰

National Federation may also have a profound effect on the reputation of Chief Justice Roberts and the Court. Apparently, he was prepared to strike down the ACA for two months after the March oral arguments until he switched his vote in May,²¹ despite bitter objections

14. See, e.g., THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."); THE FEDERALIST NO. 32, at 199 (Alexander Hamilton) (similar). The Tenth Amendment made this principle explicit: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

15. *Nat'l Fed'n*, 132 S. Ct. at 2577–80 (Roberts, C.J.); *accord id.* at 2642–44 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

16. *Id.* at 2589, 2602 (Roberts, C.J.); *accord id.* at 2646–47, 2659–60 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Court adopted the interpretation of these Clauses that had been set forth by Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010) [hereinafter Barnett, *Commandeering*]. This article summarized the arguments about Congress's lack of constitutional power to impose the IM that Barnett had developed in numerous short pieces beginning in 2009. He also spearheaded the litigation challenging the ACA. See Randy E. Barnett, *No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?*, 65 FLA. L. REV. 1331 (2013) [hereinafter Barnett, *No Small Feat*] (describing his experience in attacking the ACA as a scholar and lawyer).

17. See *supra* note 10 and accompanying text; see also Richard A. Epstein, *A Most Improbable 1787 Constitution: A (Mostly) Originalist Critique of the Constitutionality of the ACA*, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 28, 39 (Nathaniel Persily, Gillian E. Metzger & Trevor W. Morrison eds., 2013) (deeming "ludicrous" Roberts's conclusion that Congress cannot regulate inactivity under the Commerce Clause, but can do an end-run around this prohibition by resorting to the Taxing Clause).

18. See *infra* note 174 and accompanying text.

19. See *Nat'l Fed'n*, 132 S. Ct. at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (establishing this point through a detailed examination of the ACA's provisions and legislative history).

20. See *id.* at 2655.

21. A veteran Court reporter first broke this story. See Jan Crawford, *Roberts Switched*

from his Republican colleagues.²² Why did Roberts do it?

Some commentators have charged that he caved in to public pressure from the Obama Administration and its supporters in Congress and the media.²³ Others have asserted that the Chief Justice sought to preserve the Court's image as an institution governed by law rather than politics, as the public would perceive that the outcome was contrary to his political views and showed appropriate judicial deference to the elected branches (and to voters, who could decide the fate of Obamacare in the upcoming election).²⁴ Finally, many prominent scholars, both

Views to Uphold Health Care Law, CBSNEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

22. Their hostility is evident not merely from their opinion's tone but also from its odd form and language. Initially, they departed from the longstanding practice of having one Justice author a dissent which is joined by the others, and instead began their opinion with a unique caption: "Justice SCALIA, Justice KENNEDY, Justice THOMAS, and Justice ALITO, dissenting." *Nat'l Fed'n*, 132 S. Ct. at 2642. Moreover, they labeled their opinion a "dissent" and refused to join any portion of Chief Justice Roberts's opinion, even though they actually concurred with him on every major issue except the Taxing Power—and thus essentially repeated most of his analysis. See Crawford, *supra* note 21. Finally, the joint dissent reads like a majority opinion (and indeed frequently refers to Justice Ginsburg's concurrence as a "dissent"), with caustic criticism of the Chief Justice seemingly inserted into their original draft after he had changed his mind. See John C. Eastman, *Hidden Gems in the Historical 2011–2012 Term, and Beyond*, 7 CHARLESTON L. REV. 1, 17–19 (2012) (detailing the many linguistic clues in the joint dissenters' opinion which suggest that they originally had Roberts's full support and then refused to alter their language after he jumped ship).

23. See, e.g., Eastman, *supra* note 22, at 16–22; Crawford, *supra* note 21. Indeed, many Republicans "exhibited a level of rage against the Chief Justice for betraying the [conservative] agenda." Pamela S. Karlan, *Democracy and Disdain*, 126 HARV. L. REV. 1, 7 (2012).

24. See, e.g., Noah Feldman, *John Roberts, A Conservative Liberals Can Love*, BLOOMBERG (July 2, 2012), <http://www.bloomberg.com/news/2012-07-02/liberals-should-be-glad-john-roberts-is-so-conservative.html> (claiming that Roberts showed he was a "true practitioner of judicial restraint"); Stephen B. Presser, *Liberty Lost? The Supreme Court Punts*, CNN (June 28, 2012, 3:51 PM), <http://www.cnn.com/2012/06/28/opinion/presser-supreme-court/> (arguing that Roberts did not want to plunge the Court back into the "political thicket" it had entered in *Bush v. Gore*, 531 U.S. 98 (2000), but instead entrusted the ACA to voters in the upcoming election); David Cole, *Obamacare Upheld*, THE NATION (June 28, 2012) (maintaining that Roberts sought to repair the Court's standing as an apolitical body).

One scholar has described the Chief Justice's opinion as "a consummate act of institutional diplomacy . . . [that] avoided the unpalatable result of having the Court invalidate President Obama's signature achievement in the midst of a close reelection campaign by a 5–4 vote that would have mapped the Justices' ideological leanings." Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 84 (2012). Professor Metzger characterizes the opinion as a compromise that reconciles two competing institutional imperatives: protecting the Court's reputation as impartial and deferential to the elected branches on policy issues, while reaffirming the Court's supremacy in constitutional interpretation (which inevitably has political overtones). *Id.* at 84–103, 112–13. Nonetheless, she identifies a consistent theme in Roberts's opinion: a libertarian resistance to government compulsion in favor of indirect, flexible, and incentive-based regulations. *Id.* at 85–87, 104–13. For example, Congress could not deploy the

conservative and liberal, have suggested that the Machiavellian Roberts shrewdly gave liberal Democrats an immediate victory, but advanced long-term conservative Republican interests by curtailing Congress's power under the Commerce, Necessary and Proper, and Spending Clauses²⁵—and by insulating himself from charges of partisanship when he later casts conservative votes on issues like affirmative action and same-sex marriage.²⁶

The very fact that such charges of political manipulation can plausibly be leveled damages Chief Justice Roberts's credibility and that of the Court.²⁷ To be clear, I am not impugning John Roberts's integrity, even though I disagree with his opinion on the Taxing Clause. The true reason for Roberts's switch might simply be that he is a skilled

Commerce Clause to compel individuals to buy health insurance, but could use the Taxing Power to give them a choice to purchase such insurance or pay a small tax. *Id.* at 86, 104–05, 107–08, 111. Similarly, under the Spending Clause, Congress could not coerce states to accept the Medicaid expansion, but could give them monetary inducements to do so. *Id.* at 86, 100, 105, 108, 111.

25. Most significantly, the intellectual architect of the ACA challenge has drawn this conclusion. See Barnett, *No Small Feat*, *supra* note 16, at 1333–35, 1343–49 (lamenting that conservatives did not prevail in the case, but asserting that they succeeded in their larger goal of saving the Constitution by persuading the Court to reaffirm the fundamental principle of limited and enumerated federal powers that are judicially enforceable).

On the other side of the ideological spectrum, liberal luminary Laurence Tribe praised the Chief Justice for upholding the IM as a tax and thereby restoring Americans' confidence in the Court as an apolitical legal body, but worried that Roberts's "incorrect" constructions of the Commerce, Necessary and Proper, and Spending Clauses might have destructive doctrinal effects in future cases if the Republicans retained their majority. Laurence Tribe, *Chief Justice John Roberts's Ruling Restores Faith in the Court's Neutrality*, DAILY BEAST (June 28, 2012, 2:39 PM), <http://www.dailybeast.com/articles/2012/06/28/chief-justice-john-roberts-ruling-restores-faith-in-the-court-s-neutrality.html>; see also Karlan, *supra* note 23, at 11, 27–69 (portraying *National Federation* as one element of the conservative Justices' broader effort to reverse or limit key Warren Court cases upholding Great Society and civil rights legislation and to disable the federal government from addressing crucial national problems in innovative ways through the political process).

In short, the theme that conservatives "lost the battle over the individual mandate but won the constitutional war" cuts across party lines. See Metzger, *supra* note 24, at 87 (citing a politically diverse group of scholars).

26. See Ronald Dworkin, *Why Did Roberts Change His Mind?*, NYRBLOG (July 9, 2012, 2:05 PM), <http://www.nybooks.com/blogs/nyrblog/2012/jul/09/why-did-roberts-change-his-mind/> ("Roberts may want to blunt the anticipated accusations of political partisanship that any right-wing decisions in these [upcoming] cases will likely attract . . ."); Gregory P. Magarian, *Chief Justice Roberts's Individual Mandate: The Lawless Medicine of NFIB v. Sebelius*, 108 NW. U. L. REV. 15, 33 (2013) (similar).

27. See Glenn H. Reynolds & Brannon P. Denning, *National Federation of Independent Business v. Sebelius: Five Takes*, 40 HASTINGS CONST. L.Q. 807, 818–23 (2013) (contending that revelations about Roberts changing his vote in response to partisan political and media attacks, combined with his unconvincing legal opinion, failed to legitimate the ACA's constitutionality and raised questions about the Court's integrity).

appellate lawyer.²⁸ At the High Court level, such attorneys seek to cobble together at least five votes, typically by crafting a centrist position that often relies on extremely technical legal analysis and fine distinctions.²⁹ The pragmatic goal is to win the particular case,³⁰ even by making inconsistent or hairsplitting arguments—or perhaps convincing oneself that they are actually logical and meaningful.³¹ The Chief Justice's needle-threading opinion bears the hallmarks of a consummate appellate advocate.

It is not necessarily bad to have such a master legal technician cautiously crafting compromise opinions.³² Nonetheless, great Chief Justices like John Marshall and Earl Warren had a broad and coherent constitutional vision, which they reinforced in each individual decision.³³ Instead of hitting such home runs, the Roberts Court is playing small ball. Given the ideological divisions on the Court, this trend will likely continue until a Democratic appointee is replaced by a Republican one, or vice versa.³⁴

28. Kurt Lash and Alan Untereiner urged me to consider this explanation as the most plausible one. John Roberts won a majority of the many cases he argued before the Supreme Court as Deputy Solicitor General from 1988–1992 and as head of Hogan & Hartson's appellate department from 1992–2002. *See John G. Roberts Jr.*, THE OYEZ PROJECT AT ITT CHI.-KENT C. L. (May 19, 2013), http://www.oyez.org/justices/john_g_roberts_jr.

29. *See, e.g.*, CAROLE C. BERRY, EFFECTIVE APPELLATE ADVOCACY 53–56 (3d ed. 2003).

30. *See* MYRON MOSKOVITZ, WINNING AN APPEAL 2 (3d ed. 1995).

31. *See id.*; *see also* FREDERICK BERNAYS WEINER, EFFECTIVE APPELLATE ADVOCACY 234 (rev. ed. 1950) (“[T]he really outstanding advocate . . . [possesses] an inner conviction of the soundness and correctness of his case. . . . This inner conviction is often self-induced, frequently by an involved process of rationalization, but it is none the worse for that.”).

32. Martha Minow has maintained that Chief Justice Roberts did not merely broker a result-oriented political compromise, but rather set forth an independent legal analysis that thoughtfully engaged the arguments of the two opposed groups of Justices. *See* Minow, *supra* note 13, at 118–21, 132–49. On the one hand, he embraced the joint dissent's idea that the Constitution aimed to preserve liberty, especially by establishing a limited federal government. *Id.* at 132–38, 140–45, 147. On the other hand, he took to heart Justice Ginsburg's concern that a restrained judiciary should be appropriately deferential to the politically accountable branches and allow them to operate efficiently. *Id.* at 132–35, 138–40, 143–45, 147. Moreover, Dean Minow defended Roberts's reported vote switch by pointing out that “[a] change in one's views while considering arguments in a pending case is at least as likely to indicate being open to reason as being vulnerab[le] to political considerations.” *Id.* at 120 n.19.

33. *See generally* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835 (1997) (detailing the Marshall Court's decisions); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000) (providing an in-depth history of the Warren Court).

34. Over the past generation, a high percentage of major constitutional cases, involving both the scope of federal power and individual rights (e.g., abortion and affirmative action), have been decided by five-to-four votes that tracked the Justices' political party affiliation. Admittedly, these results were not necessarily binary, as a swing Justice or two (like O'Connor or Kennedy) often wrote a compromise concurring opinion. *See* Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 520–29, 578–91 (2008). Justice Alito's replacement of Justice O'Connor had apparently left

The foregoing themes will be developed in three parts. Part I will critically examine the doctrinal changes wrought by *National Federation*. Part II will look more broadly at the jurisprudential implications of the decision, particularly the treatment of federalism. Part III will consider the impact of the Obamacare case on the Court as an institution.

I. A DOCTRINAL ANALYSIS OF *NATIONAL FEDERATION*

National Federation breaks new ground as to the scope of Congress's powers under the Commerce, Necessary and Proper, Taxing, and Spending Clauses. I will examine each of these powers, and the Justices' opinions about them, in turn.

A. *The Commerce Clause*

The Court's conservative and liberal blocs interpreted and applied the same Commerce Clause cases in quite different ways. Summarizing this precedent helps to illuminate why it is susceptible to such divergent readings.

1. The Leading Cases

In his seminal opinion in *Gibbons v. Ogden*,³⁵ Chief Justice Marshall construed Congress's power "to regulate Commerce . . . among the several States" generously, in two ways. First, he defined "commerce" as not merely "trade" (buying and selling goods), but all "commercial intercourse"—including compensated services, such as the ferry transportation at issue.³⁶ Second, "among the several States" encompassed not only commerce that crossed state lines, but also that which took place internally but affected at least one other state.³⁷

Justice Kennedy as the lone remaining moderate, which made it surprising that Chief Justice Roberts (previously a staunch member of the Court's right wing) penned the controlling opinion in *National Federation*.

Moreover, I recognize that there are other isolated cases in which a Justice voted against his or her political or ideological preference. Nonetheless, the general trend is that the Court's political divisions have hardened.

35. 22 U.S. (9 Wheat.) 1 (1824).

36. The New York Legislature had granted Ogden the exclusive right to operate ferries traveling from that state to New Jersey, and Gibbons later threatened that monopoly by beginning ferry service under a license granted pursuant to a 1793 federal law regulating "vessels . . . in the coasting trade." *Id.* at 1–2. Ogden claimed that Congress lacked power to enact this statute because "commerce" referred only to the sale of goods, but the Court found that this word encompassed other forms of commercial interaction like navigation. *See id.* at 188–92; *see also id.* at 229–30 (Johnson, J., concurring) (listing other types of "commerce," such as paid labor and other services, commercial paper and similar documents of exchange, and communications).

37. *Id.* at 195, 203.

For the next six decades, the Court had no occasion to consider Congress's authority under the Commerce Clause because the scope of federal legislation remained so modest. In the late nineteenth century, however, Congress started to regulate more extensively by tackling such critical subjects as monopolies and railroads, and the Court responded by establishing certain limits.³⁸ Most importantly, the Court declared that "commerce" included only transportation and the sale of goods (not their prior production through manufacturing, farming, mining, or other types of labor) and interpreted the Tenth Amendment as prohibiting Congress from regulating activities that were "local," even if they indirectly affected interstate commerce.³⁹

This jurisprudence initially led a majority of Justices to invalidate the New Deal laws that had been passed by Congress, at President Franklin Roosevelt's urging, to address the severe agricultural, industrial, and labor problems caused by the Depression.⁴⁰ When voters resoundingly reelected Roosevelt and his congressional supporters in 1936, however, the Court capitulated.⁴¹ It held in *NLRB v. Jones & Laughlin Steel Corp.*⁴² that Congress could reach even noncommercial and intrastate activities (such as labor relations) if doing so was "[n]ecessary and [p]roper" to effectuate the regulation of "commerce . . . among the several States."⁴³ In doctrinal terms, anything that "substantially affected" interstate commerce now fell within the purview of the federal government.⁴⁴

Shortly thereafter, *Wickard v. Filburn*⁴⁵ vastly expanded Congress's power. The Court upheld a provision of the Agricultural Adjustment Act as applied to Filburn, a small farmer who had grown more wheat than permitted under his federal quota and had consumed the excess at home.⁴⁶ The Court deemed it irrelevant that Filburn had not been involved in "commerce" (selling wheat) and that neither he nor his wheat had traveled interstate.⁴⁷ Similarly immaterial was Filburn's

38. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 67–79 (1999) (examining the pertinent statutes and cases).

39. See *id.* at 68–70, 78 (describing the main decisions).

40. See *id.* at 70–71, 73–74, 78–79 (citing cases).

41. See *id.* at 79.

42. 301 U.S. 1 (1937).

43. See *id.* at 34–40.

44. See *id.* at 36–40; see also *United States v. Darby*, 312 U.S. 100, 113, 117–19 (1941) (sustaining the Fair Labor Standards Act on the ground that employment wages and hours have a "substantial effect" on the interstate economy).

45. 317 U.S. 111 (1942).

46. *Id.* at 113–28.

47. *Id.* at 120–25.

“trivial” impact on interstate commerce, because Congress could measure the “substantial effect” by aggregating all of the regulated activity (such as growing wheat at home) across the nation.⁴⁸

Wickard’s “aggregation” concept made congressional power virtually plenary, because just about any activity, when added up across America, exerted a “substantial effect” on the interstate economy.⁴⁹ To remove any possible constraints, the Court in evaluating the Civil Rights Act of 1964 announced that it would uphold a federal statute if the Justices could think of a “rational basis” that Congress might have had for determining that the regulated conduct “substantially affected” interstate commerce, regardless of whether Congress had actually provided any supporting evidence.⁵⁰ For the next three decades, this exceedingly lax standard of review led to the automatic approval of all challenged federal legislation, most importantly that dealing with major crimes and the environment.⁵¹

This blind judicial deference came to a halt in *United States v. Lopez*,⁵² when Chief Justice William Rehnquist and his four conservative colleagues struck down the Gun-Free School Zones Act (GFSZA), which had made it a crime to possess a firearm within a thousand feet of a school.⁵³ Despite seemingly contrary precedent,⁵⁴ the Court asserted that congressional attempts to take over subjects of

48. *Id.* at 127–28.

49. Predictably, the Court sustained every federal statute passed under the Commerce Clause for nearly six decades. *See Nelson & Pushaw, supra* note 38, at 79–88 (citing precedent).

50. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–58 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 298, 303–05 (1964).

51. *See Nelson & Pushaw, supra* note 38, at 86–88 (summarizing decisions upholding federal criminal and environmental laws).

52. 514 U.S. 549 (1995).

53. *Id.* at 551–68.

54. Four dissenters argued that the Court’s long-settled case law dictated the holding that Congress could rationally have found that the possession and use of guns near schools, considered in the aggregate, had a “substantial effect” on interstate commerce (for instance, by compromising students’ ability to learn, which reduced their economic prospects). *See id.* at 602–03 (Stevens, J., dissenting, joined by Ginsburg, J.); *id.* at 603–15 (Souter, J., dissenting); *id.* at 615–44 (Breyer, J., dissenting).

Indeed, *Lopez* conflicted with two established doctrines. First, the relevant inquiry was not whether the regulated conduct was innately “commercial,” but rather whether it “substantially affected” interstate commerce. *See, e.g., Heart of Atlanta*, 379 U.S. at 258; *Wickard v. Filburn*, 317 U.S. 111, 120–25 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 40 (1937). Second, if that test were met, Congress could legislate without any independent limitations imposed by Tenth Amendment notions of preserving islands of state authority. *See, e.g., United States v. Darby*, 312 U.S. 100, 119–24 (1940); *cf. Wickard*, 317 U.S. at 120–25. Moreover, one contrary case seemed to be directly on point, as the Court had previously acknowledged Congress’s power to ban the possession of guns (e.g., by felons). *See Scarborough v. United States*, 431 U.S. 563, 569–77 (1977). The majority’s attempts to distinguish such precedent were unconvincing.

“traditional state concern” (like crime and education) warranted more rigorous application of the “substantial effects” test.⁵⁵ This newly aggressive approach would result in invalidating laws such as the GFSZA that did not concern activity that was “commercial,” considered either by itself or as “an essential part of a larger regulation of economic activity.”⁵⁶

Unfortunately, the Court did not explain why it had long sustained federal statutes that encroached on areas of “traditional state concern” (including many criminal and educational laws) whenever Congress had concluded that economic and social changes had transformed such formerly local subjects into ones of national interest.⁵⁷ Was such entrenched federal legislation now vulnerable to attack, or would *Lopez*’s heightened scrutiny apply only to new statutes? Similarly confusing was the Court’s insistence that Congress could regulate only “commerce” while refusing to define that word, which left its meaning to be fleshed out piecemeal in future cases.⁵⁸ Another problem with *Lopez* was its failure to identify any objective criteria (e.g., dollar amounts) to distinguish “substantial” from “insubstantial” effects on interstate commerce.⁵⁹ Not surprisingly, these vague standards provided little concrete guidance for lower federal courts.

The Court did little to clarify analysis in *United States v. Morrison*,⁶⁰ which struck down a provision of the recently enacted Violence Against Women Act (VAWA) that granted a federal civil remedy to victims of gender-motivated assaults.⁶¹ The five conservative Justices held that Congress had interfered with a matter of “traditional state concern” (criminal and tort law) and lacked a rational basis for finding that sexist violence was “commerce” (either of itself or as part of a broader economic regulatory program) or “substantially affected” interstate commerce.⁶²

Lopez and *Morrison* involved two novel, largely symbolic statutes that duplicated existing state laws.⁶³ When asked to invalidate long-established and significant federal legislation addressing drug crimes,

55. *Lopez*, 514 U.S. at 577, 580 (Kennedy, J., concurring); see *id.* at 561 (majority opinion).

56. *Id.* at 561 (majority opinion).

57. See Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power to Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 331–32 (2005).

58. *Id.* at 331.

59. See *id.*

60. 529 U.S. 598 (2000).

61. *Id.* at 601–19.

62. *Id.* at 617–18.

63. See Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 882–97 (2005).

however, Justices Scalia and Kennedy faltered. In *Gonzales v. Raich*,⁶⁴ they sided with the four *Lopez* and *Morrison* dissenters in ruling that Congress could have had a rational basis for determining that it must criminalize noncommercial action within a state—growing, possessing, and using marijuana for medical purposes as directed by state law—to carry into effect its overall regulation of interstate economic activity (marijuana trafficking).⁶⁵ Chief Justice Rehnquist and Justices O'Connor and Thomas dissented on the ground that Congress had invaded areas of “traditional state concern” (crime and medical care) and had targeted people who were not engaged in “commerce,” as they had not bought or sold marijuana.⁶⁶

Some commentators accused Justices Scalia and Kennedy of sacrificing their federalism principles to further the conservative policy aim of maintaining a tough antidrug stance.⁶⁷ Whatever the merits of that charge, the legal standards in *Lopez* and *Morrison* were flexible enough to enable those Justices to distinguish these two cases as concerning congressional attempts to reach activity (such as gender-based violence) that cannot sensibly be treated as “commercial,” either inherently or as part of a broader economic regulatory scheme. Furthermore, *Raich* suggested that the enhanced scrutiny of *Lopez* and *Morrison* would be applied only to relatively new federal statutes that had never before been challenged, not to those that had previously been sustained. Because very few laws enacted under the Commerce Clause are both novel and entirely noncommercial, legal analysts from across the political spectrum read *Raich* as sounding the death knell for the Court’s quest to impose limits on Congress.⁶⁸ I rejected this prevailing wisdom:

[I]t is impossible to determine whether the majority or the dissent [in *Raich*] correctly applied the *Lopez* and *Morrison* standards, because they are so malleable as to justify either result. Moreover, as the Justices implement these standards prudentially on a case-by-case basis, it is unwise to extrapolate far-reaching implications from any single decision. Just as many scholars prematurely heralded *Lopez* as the beginning of a Commerce Clause revolution, others now may be too quick to characterize *Raich* as the end.

64. 545 U.S. 1 (2005).

65. See *id.* at 5–33.

66. See *id.* at 42–57 (O'Connor, J., dissenting, joined by Rehnquist, C.J.); *id.* at 74 (Thomas, J., dissenting).

67. See Randy E. Barnett, *Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 743 (2005); David Bernstein, *Originalism in Crisis*, VOLOKH CONSPIRACY (Nov. 2, 2005, 4:34 PM), <http://www.volokh.com/2005/11/02/originalism-in-crisis/>.

68. See Pushaw, *supra* note 63, at 883–84, 907–08 (describing this consensus).

Finally, the Court's discretionary application of protean standards guarantees both accusations of political manipulation and continuous uncertainty for Congress, lower court judges, and lawyers.⁶⁹

The Obamacare case fulfilled my prediction.

2. The *National Federation* Opinions

Chief Justice Roberts, along with Justices Scalia, Kennedy, Thomas, and Alito, held that Congress lacked power to enact the IM under the Commerce and Necessary and Proper Clauses.⁷⁰ At the threshold, they emphasized that the ACA represented the first time Congress had ever relied upon the Commerce Clause to force people who were not participating in commerce to buy an unwanted product.⁷¹ That unbroken practice reflected the common-sense understanding that the phrase “to regulate Commerce” presupposes existing commercial activity to be regulated, not legislatively commanding the creation of such commerce.⁷²

Indeed, the Court noted that it had always read the Commerce Clause as extending only to commercial “activity,” thereby excluding inactivity.⁷³ Letting Congress reach inaction through the IM would open up a vast legislative domain in which the federal government could compel Americans to buy anything (e.g., vegetables to improve health)

69. See *id.* at 884 (footnotes omitted).

70. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (Roberts, C.J.); accord *id.* at 2644–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

71. See *id.* at 2586 (Roberts, C.J.); accord *id.* at 2644–46 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Concededly, Congress had occasionally required Americans to act (e.g., serving on juries, filing taxes, registering for the draft, and buying firearms for militia service), but those mandates were not passed under the Commerce Clause and instead involved basic obligations of citizenship. See *id.* at 2586 n.3 (Roberts, C.J.); Barnett, *Commandeering*, *supra* note 16, at 630–32. But see Dan T. Coenen, *Originalism and the “Individual Mandate”*: *Rounding Out the Government's Case for Constitutionality*, 107 NW. U. L. REV. COLLOQUY 55, 64–65 (2012) (arguing that Congress should have the same ability to use mandates as a means to execute its power under the Commerce Clause as it does under other Article I provisions, including those that address citizenship duties).

72. “[T]o regulate” means “to adjust by rule or method,” which assumes existing activity that requires adjustment. *Nat'l Fed'n*, 132 S. Ct. at 2587 n.4 (Roberts, C.J.); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). If “regulation” included creation, then many constitutional clauses would be superfluous. *Id.* at 2586–87 (Roberts, C.J.) (illustrating this point with several examples, such as the Constitution's separate provisions authorizing Congress to create the armed forces and regulate them); *id.* at 2644 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (same).

73. *Id.* at 2587–91 (Roberts, C.J.) (citing an unbroken line of cases stretching from *Jones & Laughlin* to *Raich*); *id.* at 2643, 2646, 2648–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (similar); see also Barnett, *Commandeering*, *supra* note 16, at 587–607 (developing the “activity vs. inactivity” distinction).

and then assert that its own mandate has produced a “substantial effect” on the interstate economy.⁷⁴ The majority distinguished *Wickard* as involving a congressional regulation of commercial wheat farmers whose activities exerted a significant national impact, not an attempt to require consumers to purchase a commodity.⁷⁵ While conceding that inactivity might substantially affect interstate commerce, the five Republican Justices cautioned that granting Congress power to address non-action would profoundly change the citizen’s relationship to the federal government, which would become virtually unrestrained.⁷⁶ And the Court would not allow this fundamental constitutional limit on Congress to be evaded through two stratagems.

The first was the government’s claim that the “inactivity” of not buying insurance was actually the “activity” of relying on one’s assets (or on others) to pay for health care when it was needed later.⁷⁷ The majority rejected that notion because Congress could regulate only existing commercial health care *activities*, not a class of *individuals* (such as the uninsured) who were not currently engaged in such commerce but who might be at some unknown future time.⁷⁸

Secondly, the Court refused to permit Congress to invoke the Necessary and Proper Clause to aggrandize new “substantive” powers (such as regulating people who were not engaged in commercial activity), because that Clause authorized only laws that were “derivative of” and “incidental to” another enumerated power (like the Commerce Clause).⁷⁹ Hence, the IM was not a “proper” means to implement the

74. See *Nat’l Fed’n*, 132 S. Ct. at 2587–88 (Roberts, C.J.); see also *id.* at 2649–50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

75. See *id.* at 2587–88 (Roberts, C.J.) (citing *Wickard v. Filburn*, 317 U.S. 111, 114–15, 127–29 (1942)); see also *id.* at 2643, 2648 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (similar).

76. See *id.* at 2588 (Roberts, C.J.); see also *id.* at 2645–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (same).

77. See *id.* at 2589–90 (Roberts, C.J.); *id.* at 2647–49 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

78. See *id.* at 2590–91 (Roberts, C.J.); *id.* at 2647–48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). The Chief Justice denied that the Commerce Clause licensed Congress to control each citizen “from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.” *Id.* at 2591 (Roberts, C.J.).

Furthermore, he rejected the government’s argument that these basic constitutional principles should be disregarded because health insurance was a unique market that was inextricably linked to the consumption and financing of medical services. See *id.* (pointing out that insurance and health care services were separate products provided by different companies at different times). But see Metzger, *supra* note 24, at 93–95 (contending that Roberts could have saved the IM under the Commerce Clause by restricting its applicability to those who had participated in the activity of obtaining health care, as contrasted with people who had remained wholly outside of this market).

79. See *Nat’l Fed’n*, 132 S. Ct. at 2591–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy,

Commerce Clause because it subverted basic constitutional structural principles, most notably limited and enumerated federal powers.⁸⁰ Finally, the majority observed that Congress could have accomplished its objectives through other means, unlike in other situations.⁸¹ The Republican Justices, then, would not enable Congress to invoke the Necessary and Proper Clause as a bootstrap to grab power it did not possess under the Commerce Clause.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented on the ground that the Court's longstanding precedent required deference to Congress, which could rationally have found that the ACA regulates economic subjects that, viewed in the aggregate, substantially affected interstate commerce.⁸² Justice Ginsburg characterized the IM as addressing not merely insurance, but also Americans' larger decisions about how to pay for the health care that all of them will eventually need.⁸³ She emphasized that most people cannot afford to buy medical services out-of-pocket and thus purchase insurance.⁸⁴ Nonetheless, millions of uninsured Americans access health care services and goods (often at emergency rooms where, by law, they must be treated) but never pay, thereby shifting enormous costs to the insured (who are charged higher premiums) or to taxpayers.⁸⁵ Such conduct, Justice Ginsburg concluded, had a significant impact on interstate commerce that warranted federal intervention.⁸⁶

Furthermore, she argued that the Commerce Clause, as written and as interpreted, did not make the economically untenable distinction between "activity" and "inactivity."⁸⁷ Indeed, the Court in *Wickard*

Thomas, and Alito, JJ., dissenting).

80. See *id.* at 2592–93 (Roberts, C.J.); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Here the Court adopted the position articulated by Barnett, *Commandeering*, *supra* note 16, at 595–601, 604–07, 618–37.

81. *Nat'l Fed'n*, 132 S. Ct. at 2591–93 (Roberts, C.J.); *id.* at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). For example, *Raich* concerned a statute that prohibited the possession and use of marijuana, which was the only feasible way to effectuate the larger legislative scheme of banning interstate commerce in marijuana. See *id.* at 2592–93 (Roberts, C.J.); *id.* at 2646–47 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

82. See *id.* at 2609–28 (Ginsburg, J., concurring in part, dissenting in part).

83. See *id.* at 2610–11, 2620; see also *id.* at 2617 (asserting that those who choose not to get insurance are making an "economic" decision).

84. See *id.* at 2610 (Ginsburg, J., concurring in part, dissenting in part).

85. See *id.* at 2610–11, 2619–20, 2623 (stressing that such "free riding" did not occur in any other businesses, and that therefore upholding the IM would not provide legal authorization for Congress to issue mandates as to other enterprises); see also ACA, 42 U.S.C. § 18091(2)(F), (G) (2012) (finding that health care given to the uninsured amounts to \$43 billion a year and that those costs were passed on to the insured).

86. See *Nat'l Fed'n*, 132 S. Ct. at 2612–15 (Ginsburg, J., concurring in part, dissenting in part); see also *id.* at 2612 (maintaining that states cannot resolve this problem on their own because any state that grants universal health insurance will be at a competitive disadvantage).

87. See *id.* at 2621–23.

explicitly recognized that Congress could “[f]orc[e] some farmers into the market to buy what they could provide for themselves.”⁸⁸ Likewise, Justice Ginsburg cited cases such as *Wickard* and *Raich* that had sustained federal legislation addressing current noncommercial conduct simply because of its likely future effect on interstate commerce.⁸⁹ Finally, she contended that, even assuming the IM did extend to noncommercial and local subjects, the Necessary and Proper Clause authorized Congress to determine that the IM was an “‘essential par[t] of a larger regulation of economic activity’ . . . [in which] ‘the regulatory scheme could be undercut’” unless the intrastate activity were regulated.⁹⁰ Here Congress’s broad commercial regulatory scheme of providing affordable medical insurance for all Americans would be undermined without the IM.⁹¹

3. Problems with the Court’s Analysis

Many scholars have asserted that *National Federation* represents a seismic shift in jurisprudence under the Commerce and Necessary and Proper Clauses that threatens the modern social welfare state.⁹² Perhaps such a revolution is underway, but it is worth remembering that *Lopez* prompted similar dire warnings, which *Raich* exposed as wildly exaggerated.⁹³ Therefore, we should resist the temptation to read too much into any one decision.

Rather, I submit that *National Federation* continues the *Lopez/Morrison/Raich* pattern of a divided Court prudentially applying standards so flexible that they can plausibly justify either upholding or invalidating most challenged federal statutes, which fuels suspicion that results reflect politics rather than law.⁹⁴ These problems intensify when the Court considers an issue of first impression, such as whether the

88. *See id.* at 2621 (quoting *Wickard v. Filburn*, 317 U.S. 111, 129 (1942)).

89. *See id.* at 2617–20.

90. *See id.* at 2625–26 (quoting *Gonzales v. Raich*, 545 U.S. 1, 24–25 (2005)). Justice Ginsburg found unpersuasive the Chief Justice’s arguments that (1) the IM was not “proper” even if it was “necessary,” and (2) “incidental” powers could meaningfully be distinguished from “substantive” ones. *See id.* at 2626–28.

91. *See id.* at 2613–15, 2617, 2625–26 (contending that the IM was necessary because otherwise the ACA’s “guaranteed issue” of insurance would allow freeloaders to wait until they had a significant injury or illness to purchase a policy). The IM did not require buying an unwanted product, because at some point everyone will need (and want) health care, and Congress simply concluded that they must pay for it in advance through insurance rather than at the time of service (when funds might not be available). *Id.* at 2617–20.

92. *See supra* notes 13, 24–26 and accompanying text.

93. *See supra* notes 68–69 and accompanying text.

94. *See supra* Subsection I.A.1. I previously sketched the following analysis in Robert J. Pushaw, Jr., *Obamacare and the Original Meaning of the Commerce Clause: Identifying Historical Limits on Congress’s Powers*, 2012 U. ILL. L. REV. 1703, 1743–53.

Commerce Clause authorizes Congress to impose purchase mandates.⁹⁵ Thus, it was hardly surprising in *National Federation* that two groups of Justices answered that question in polar opposite ways based upon radically different understandings of the governing precedent.

Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas, and Alito, emphasized that the Commerce Clause has always been interpreted as reaching only existing commercial “activity,” not “inactivity.”⁹⁶ They were correct in the sense that virtually every modern Commerce Clause decision says that Congress can regulate “activity” that substantially affects interstate commerce.⁹⁷ But the Republican Justices ignored a critical point: The Court in these opinions never mentioned “inactivity” because all of the legislation under review addressed affirmative conduct.⁹⁸ Rather, cases like *Lopez*, *Morrison*, and *Raich* were contrasting “commercial” activity with “noncommercial” activity.⁹⁹ Therefore, whether Congress could regulate “inactivity” was an open question.

Moreover, the majority assumed that there was a bright line separating “activity” from “inactivity.” This distinction, however, often depends on how one characterizes the facts, especially in the commercial context.¹⁰⁰ For instance, the conservative Justices found it obvious that people who do not buy insurance are “inactive,” whereas Justice Ginsburg thought that those who choose to remain uninsured but consume medical services are “active.”¹⁰¹ A similar debate might arise in other contexts. For example, is someone who holds stock rather than selling it participating in commercial “activity”?¹⁰²

95. See *Nat'l Fed'n*, 132 S. Ct. at 2642 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (noting this novelty).

96. See *supra* notes 73–76 and accompanying text.

97. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17–18, 20–26, 28–30, 32 (2005); *United States v. Morrison*, 529 U.S. 598, 607–27 (2000); *United States v. Lopez*, 514 U.S. 549, 552–57 (1995); *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

98. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1285–86 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235, *aff'd in part, rev'd in part sub nom.*, *Nat'l Fed'n*, 132 S. Ct. 2566.

99. See *supra* notes 52–69 and accompanying text (discussing these decisions); see also Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1127–30 (2012) (noting that the Court simply restricted Congress to regulating “commercial” subjects, without considering whether they took an active or passive form).

100. See Metzger, *supra* note 24, at 93–95, 98–99 (criticizing the Court for holding that Congress could not constitutionally regulate “inactivity,” but failing to define that word).

101. See *supra* notes 71–76, 82–90 and accompanying text.

102. See *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 561 (6th Cir. 2011) (Sutton, J., concurring in part). It is worth noting that Judge Sutton, a conservative Republican, thought that the Court's Commerce Clause precedent obliged him to uphold the ACA. *Id.* at 554–66.

The Court's liberal and conservative wings also contested the applicability of *Wickard* and *Raich*. To Justice Ginsburg, these decisions dictated deferring to Congress's reasonable judgment that the IM would help to effectuate its interstate commercial regulation of health insurance.¹⁰³ To the Republican Justices, however, neither of these cases authorized a statutory provision that forced inactive Americans into a particular market.¹⁰⁴ For instance, *Wickard* involved a commercial farmer who was actively growing wheat.¹⁰⁵ *Raich* went further by permitting federal marijuana laws to be applied to noncommercial users, but even they were engaged in activity (cultivating and smoking marijuana for medical purposes).¹⁰⁶ The ACA took another—and bigger—step by targeting Americans precisely because they were inactive in a specific market (medical insurance).¹⁰⁷ Indeed, Congress's own legal analysts acknowledged that the IM was unprecedented.¹⁰⁸

The majority treated an unbroken legislative practice (such as never imposing a commercial mandate) as strong evidence that Congress did not possess such power.¹⁰⁹ Although that argument sounds logical, accepting it would result in striking down all innovative Commerce Clause statutes that respond to modern problems. For example, the Court should have invalidated New Deal legislation because Congress had not previously regulated subjects such as agriculture, labor, and banking.¹¹⁰ That same reasoning would have doomed more recent important laws, such as those prohibiting employment discrimination

103. See *Nat'l of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2617–23 (2012) (Ginsburg, J., concurring in part, dissenting in part). Many judges and scholars had previously reached the same conclusion. See, e.g., *Thomas More*, 651 F.3d at 542–47; *Mead v. Holder*, 766 F. Supp. 2d 16, 29–40 (D.D.C. 2011); *Liberty Univ., Inc. v. Geithner*, 753 F. Supp. 2d 611, 630–34 (W.D. Va. 2010); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 46–47 (2010); Coenen, *supra* note 71, at 71–72.

104. See *Nat'l Fed'n*, 132 S. Ct. at 2587–88, 2590–93 (Roberts, C.J.) (pointing out that these cases did not concern congressional attempts to compel people to purchase goods or services); *id.* at 2646–48 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). For similar arguments, see, e.g., Barnett, *Commandeering*, *supra* note 16, at 605, 615–20; Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 938 (2012).

105. See *Wickard v. Filburn*, 317 U.S. 111, 113–28 (1942). See generally *supra* notes 45–48 and accompanying text.

106. See *Gonzales v. Raich*, 545 U.S. 1, 32–33 (2005). See generally *supra* notes 64–67 and accompanying text.

107. See *supra* note 4 and accompanying text.

108. See JENNIFER STAMAN & CYNTHIA BROUGH, CONG. RESEARCH SERV., R40725, *REQUIRING INDIVIDUALS TO OBTAIN HEALTH INSURANCE: A CONSTITUTIONAL ANALYSIS* 6 (2009).

109. See *Nat'l Fed'n*, 132 S. Ct. at 2586 (Roberts, C.J.); *id.* at 2649 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

110. See *supra* notes 38–48 and accompanying text.

and protecting the environment.¹¹¹ Simply put, the novelty of a statutory provision such as the IM should not be a significant factor in determining its constitutionality.¹¹²

The foregoing analysis reveals that Commerce Clause precedent is so malleable that it could have been applied to support either outcome in *National Federation*. On balance, however, Justice Ginsburg presented the better reading of this case law.

The core Commerce Clause principle established by the Rehnquist Court was that Congress could legislate only as to activity that was “commercial,” viewed either by itself or as “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”¹¹³ In *Lopez* and *Morrison*, the Court concluded that gun possession and gender-motivated violence were not “commercial,” either inherently or as a necessary component of a broader interstate economic regulatory scheme.¹¹⁴ By contrast, the majority in *Raich* deemed the growth, possession, and use of marijuana to be “commercial”—not of itself but rather because prohibiting this noneconomic, intrastate activity was “an essential part of a larger regulation of [interstate] economic activity” (the multibillion dollar national marijuana industry).¹¹⁵ The Court relied heavily upon *Wickard*, which allowed Congress to penalize the noncommercial, local growth of wheat as a necessary element of its comprehensive economic regulation of the national wheat market.¹¹⁶

These Commerce Clause principles should have led the Court in *National Federation* to focus on the undisputed fact that the ACA was a broad regulatory scheme that addressed interstate “commercial” activity (the nationwide health insurance business).¹¹⁷ The only remaining issue under *Lopez* and its progeny was whether Congress had rationally determined that the IM was an essential part of this economic regulatory program.¹¹⁸ This test merely reformulates the standard of judicial

111. See *supra* notes 49–51 and accompanying text.

112. See Coenen, *supra* note 71, at 63–64 (maintaining that the original intent and understanding of the Necessary and Proper Clause was that it granted Congress discretion to choose any means that would best accomplish future legislative goals in light of changing circumstances that could not be foreseen); see also Karlan, *supra* note 23, at 48 (emphasizing that the *National Federation* majority viewed the novelty of the ACA with suspicion, whereas the Warren Court treated congressional innovation in addressing major economic and social problems as a positive sign of responsiveness and resourcefulness).

113. *United States v. Lopez*, 514 U.S. 549, 561 (1995), cited in *Gonzales v. Raich*, 545 U.S. 1, 24 (2005), and *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

114. See *supra* notes 52–62 and accompanying text.

115. *Raich*, 545 U.S. at 5–33.

116. *Id.* at 17–20, 22, 33.

117. See ACA, 42 U.S.C. § 18091(2)(A) (2012) (congressional findings).

118. See *supra* notes 52–65, 113–16 and accompanying text.

review under the Necessary and Proper Clause that has come to be associated with *McCulloch v. Maryland*¹¹⁹: Was Congress's choice of means (the IM) reasonably related to achieving a legitimate legislative end (regulating interstate commerce in medical insurance)?¹²⁰ For two centuries, the Court has routinely deferred to such discretionary legislative judgments, as Justice Ginsburg stressed.¹²¹

Although precedent supported the dissent's arguments and conclusions, it hardly dictated them. Rather, the majority plausibly interpreted the relevant cases as reinforcing the straightforward textual meaning of the Commerce Clause: that it authorizes Congress to regulate existing commercial activity, not to compel Americans to buy certain things.¹²² It is impossible to say definitively which side is right, because the Court has adopted amorphous standards and applied them in common law fashion based on the facts and circumstances of each case.

In sum, *National Federation* and the *Lopez/Morrison/Raich* trilogy establish that Congress can regulate only "activity" that is "commercial." These two limits, however, hang on the vote of one Justice, as the four liberals have never really accepted *Lopez* and are unlikely to follow *National Federation*'s Commerce Clause doctrine.¹²³

119. 17 U.S. (4 Wheat.) 316 (1819).

120. *Id.* at 406–15.

121. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2615–17, 2625–27 (2012) (Ginsburg, J., concurring in part, dissenting in part) (invoking the unbroken line of precedent since *McCulloch* to argue that the majority should have acceded to Congress's policy determination that the IM was a rational means of implementing its valid Commerce Clause regulation of the health insurance industry); see also Coenen, *supra* note 71, at 57, 66–69 (similar).

To be clear, I do not think that the Court's previous blind deference comports with the original meaning of the Necessary and Proper Clause, which was never intended as a font of unbridled discretion that would enable Congress to skirt the limits on its Commerce Clause power. See Nelson & Pushaw, *supra* note 38, at 29, 56–57, 83, 98–100. Moreover, recent scholarship has demonstrated that the Court in *McCulloch* correctly adopted a fairly limited interpretation of the Necessary and Proper Clause, but then began to misread the opinion as recognizing extraordinarily broad congressional power. See *infra* note 128 and accompanying text. Thus, my point is that the post-*McCulloch* precedent supported Justice Ginsburg's conclusions, not that these cases accurately captured the historical meaning of the Necessary and Proper Clause.

122. See *supra* notes 7, 70–81 and accompanying text.

123. Justice Ginsburg joined the dissenters (Justices Stevens, Souter, and Breyer) in *United States v. Lopez*, 514 U.S. 549 (1995). These four Justices adhered to their position in *United States v. Morrison*, 529 U.S. 598 (2000). A few years later, they persuaded Justices Kennedy and Scalia to join them in severely circumscribing *Lopez* and *Morrison* by allowing Congress to control activity that was concededly noncommercial (growing, possessing, and smoking marijuana for personal medical purposes) because it was part of a broader regulation of interstate commerce. See *Gonzales v. Raich*, 545 U.S. 1 (2005). Justices Stevens and Souter have been succeeded by Sotomayor and Kagan, who joined Justice Ginsburg's *National*

Taking a longer view, for the past eight decades not a single Democratic Justice has voted to curb Congress's power. Therefore, if a Democratic appointee replaces a Republican one, cases like *Lopez*, *Morrison*, and *National Federation* will probably be overturned or "distinguished" into irrelevance.¹²⁴ If the conservatives cling to their slim majority, however, *National Federation* may portend further restrictions on the Commerce Power.

Many scholars have warned that such changes could be revolutionary.¹²⁵ They are justifiably concerned with two aspects of the Obamacare case. First, the Court for the first time since 1936 ruled that a significant Act of Congress (as contrasted with the trivial GFSZA and VAWA) had exceeded the scope of the Commerce Clause.¹²⁶ Second, Chief Justice Roberts and his fellow Republicans abandoned the longstanding judicial practice under the Necessary and Proper Clause of respecting Congress's choice of the means that it determined would best effectuate its exercise of Article I powers.¹²⁷ Instead, the conservative Justices asserted independent authority to decide that a means was not "proper" if it (1) was a "substantive" rather than "incidental" power, and (2) conflicted with their vision of federalism¹²⁸—a deeply contested concept that inevitably implicates politics.¹²⁹

Federation opinion endorsing plenary congressional power under the Commerce and Necessary and Proper Clauses. See *supra* notes 82–91 and accompanying text. It is hard to imagine that the four liberals will ever agree with their conservative colleagues' attempts to restrain Congress's ability to address national economic and social problems.

124. See Gary Lawson, *Night of the Living Dead: The Individual Mandate and the Zombie Constitution*, 81 *FORDHAM L. REV.* 1699, 1700 (2013) (stressing that *National Federation's* holdings as to the Commerce and Necessary and Proper Clauses might not survive the next Court vacancy).

125. See *supra* notes 13, 24–26, 92 and accompanying text.

126. See *supra* Subsection I.A.1.

127. See *supra* notes 79–81, 92, 119–21 and accompanying text.

128. Professor Lawson has argued that both of these determinations reflect the original meaning of the Necessary and Proper Clause, which the Court in *McCulloch* correctly grasped but has since misunderstood. See Lawson, *supra* note 124, at 1700–10. First, as the agent of the People, Congress only has implied powers that are "incidental" to its "principal" (i.e., enumerated) powers. See *id.* at 1700–01, 1704–06, 1710 (relying on Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 *CASE W. RES. L. REV.* 243 (2004)). Because the IM is a "principal" rather than "incidental" power, it cannot be enacted under the Necessary and Proper Clause. *Id.* at 1706. Second, the IM is not "proper" because it cannot be squared with the Constitution's structural principles of limited federal government and reserved state powers. *Id.* at 1703; see also Reynolds & Denning, *supra* note 27, at 829–30 (praising the Court for enhancing scrutiny of Congress's assertion of authority under the Necessary and Proper Clause).

129. The Court's newly muscular approach to the Necessary and Proper Clause, however, did not ultimately result in the invalidation of the ACA, which was upheld under the Taxing Power. See *infra* notes 163, 188–206 and accompanying text. Indeed, it would be surprising if the Court ever struck down a law as not "proper" under federalism principles, because doing so

Despite these innovations, I predict that *National Federation* will have a minimal impact on Commerce Clause jurisprudence.¹³⁰ The main reason is that, from 1937 until 1994, the Court upheld all laws enacted under this Clause—including those dealing with crucial matters such as labor and employment, agricultural policy, discrimination, the environment, and interstate crimes.¹³¹ All of the Justices except Thomas have accepted such precedent as settled, and even he has conceded that it will not be reversed because of *stare decisis* and practical considerations.¹³² That is precisely why the conservative Justices have targeted only new statutes that rest on a particularly expansive reading of the Commerce Clause.¹³³ But even that modest approach may not succeed. Most notably, the Rehnquist Court's only attempt to restrict Congress—the “commerce” requirement—lost steam within a decade.¹³⁴

National Federation's “activity” limit may similarly fade into insignificance. In fact, it may never be applied again because no other Commerce Clause law in history has imposed an economic mandate on inactive people, and there is no evidence that Congress intends to use this mechanism again.¹³⁵ Furthermore, even if Congress does try to regulate inactivity in the future, and even if the conservative Justices maintain their majority, they might again fail to muster the collective fortitude needed to strike down major federal legislation. After all, Justices Scalia and Kennedy could not bring themselves to invalidate key federal drug laws,¹³⁶ and Chief Justice Roberts ultimately concluded that Congress could address “inactivity” (as an exercise of its Taxing Power).¹³⁷ Indeed, *National Federation* suggests that merely articulating Commerce Clause limits will do little to restrain Congress because the Court will sustain the statute anyway as a tax—even when federal legislators and the President unequivocally assure Americans that it is not.¹³⁸

would threaten separation of powers by overturning Congress's discretionary policy judgments. See *infra* notes 329–32, 338 and accompanying text.

130. Other commentators share this assessment. See, e.g., Metzger, *supra* note 24, at 113.

131. See *supra* notes 41–51 and accompanying text.

132. See *United States v. Lopez*, 514 U.S. 549, 601 & n.8 (1995) (Thomas, J., concurring).

133. See *supra* notes 52–69 and accompanying text.

134. See *supra* notes 52–69, 93, 113–116 and accompanying text.

135. See *supra* notes 7, 71–76, 95–99, 107–109 and accompanying text.

136. See *supra* notes 64–67 and accompanying text.

137. See *infra* Subsection I.B.2.a.; see also Michael Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 898, 901–03 (2013) (contending that the “activity” restriction is fairly harmless because Congress rarely adopts mandates and, after *National Federation*, can still impose them under the Taxing Clause).

138. See *infra* notes 228–48, 255, 274–75, 340–57 and accompanying text.

In sum, *National Federation* is probably not an omen of radical transformation of Commerce Clause doctrine. Rather, the case illustrates the Court's post-1994 trend of keeping its basic analytical framework intact but crafting a few minor modifications.

4. The Neo-Federalist Alternative: Restricting Congress to the Regulation of Voluntary, Market-Based Activity

The Court's Commerce Clause decisions have long been heavily influenced by politics. Most importantly, liberal Justices concocted the basic "substantially affects interstate commerce" and "aggregation" principles to uphold the New Deal in response to Democratic Party demands.¹³⁹ Similarly, the Warren Court added the "rational basis" test to make it even easier to sustain the Great Society laws that these Justices favored.¹⁴⁰ More recently, five Republican Justices created the "commerce" and "activity" limits, which happen to further the conservative political agenda of constraining the federal government and protecting the states' reserved powers.¹⁴¹

In short, the Justices have devised nebulous standards and applied them case-by-case to reach results that usually track their political preferences. This approach will never produce doctrinal coherence or confidence in the Court's impartiality. Therefore, the Justices should consider an alternative: articulating and adhering to clear legal rules that are rooted in the Commerce Clause's language and history. The only Justice who has proposed doing so, Clarence Thomas, maintains that Congress should regulate "commerce" (which he claims originally meant only the sale and transportation of goods) that occurs "among the several States" (a phrase he would interpret restrictively as "crossing state lines").¹⁴² The other Justices have understandably refused to adopt Thomas's position because it would force them to overturn nearly eight decades of precedent and dismantle the modern administrative and social welfare state.¹⁴³

Yet fidelity to the Commerce Clause's text, history, and early implementing precedent does not require such a drastic and impractical course of action. As Grant Nelson and I have demonstrated, Justice

139. See *supra* notes 41–49 and accompanying text.

140. See *supra* notes 50–51 and accompanying text.

141. See *supra* notes 52–62, 70–81 and accompanying text. This general ideological goal of restoring traditional federalism, however, can be ignored where doing so promotes specific Republican policies, such as maximizing federal power to fight the "War on Drugs." See *supra* notes 64–67 and accompanying text (discussing the decision of Justices Scalia and Kennedy to join the *Raich* holding that Congress could prohibit even noncommercial and local marijuana possession and use authorized by state law).

142. See *United States v. Lopez*, 514 U.S. 549, 585–86, 591, 594–96 (1995) (Thomas, J., concurring).

143. See *supra* notes 42–51, 63–67 and accompanying text.

Thomas appears to be unaware of historical evidence revealing that the Commerce Clause had a far broader scope which can justify most (but not all) modern legislation.¹⁴⁴ We employed a “Neo-Federalist” methodology, which initially requires discerning a constitutional provision’s original “meaning” (i.e., its common contemporaneous definition), the “intent” of its Framers, and the “understanding” of its Ratifiers.¹⁴⁵ Next, those original Federalist principles are refined in light of subsequent congressional and judicial interpretations, with the aim of formulating workable legal rules that can be applied impartially and without quixotically expecting the Court to overturn the results in almost all of its cases.¹⁴⁶

This Neo-Federalist inquiry yielded two concrete Commerce Clause rules. First, Congress can only regulate “commerce,” which we defined as “the voluntary sale or exchange of property or services and all accompanying market-based activities, enterprises, relationships, and interests.”¹⁴⁷ Second, this “commerce” must extend “among the several States” (i.e., either cross a state border or occur within one state but affect others).¹⁴⁸ Such an interstate impact can almost always be found in America’s integrated national economy.¹⁴⁹ Thus, the validity of most statutes would depend on whether they meet our definition of “commerce,” which is broad yet bounded.

A big advantage of our “market oriented” approach is that it would not change the results in the vast majority of Commerce Clause cases (although it would alter the rationale).¹⁵⁰ As a starting point, we agree with Justice Thomas (and everyone else) that Congress can regulate interstate sales of goods and paid transportation.¹⁵¹ But we would go far beyond that core to uphold statutes in three other areas. The first is the production of goods (through manufacturing, mining, farming, and the like) intended for sale, as well as their environmental, safety, and health

144. See Nelson & Pushaw, *supra* note 38, at 6–67.

145. For a detailed explanation of this general mode of constitutional analysis, see, e.g., Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1516, 1541–42 (2007); Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 847, 849–51. We specifically used this methodology in the Commerce Clause context in two articles: Nelson & Pushaw, *supra* note 38; Robert J. Pushaw, Jr. & Grant S. Nelson, *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695 (2002). I defended Neo-Federalism as superior to other approaches (e.g., textualism, structuralism, precedent-centered analysis, and living constitutionalism) in Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185 (2003).

146. See Nelson & Pushaw, *supra* note 38, at 8–9.

147. *Id.* at 9; see also *id.* at 107–10 (fleshing out this definition).

148. *Id.* at 10–11, 110–11.

149. *Id.* at 110.

150. *Id.* at 119.

151. *Id.* at 9–10, 101, 108–09, 119–20.

externalities.¹⁵² The second consists of compensated services in addition to transportation (such as banking, insurance, and public accommodations), including antitrust and antidiscrimination laws that ensure a free market in these services.¹⁵³ The third category concerns crimes that involve the voluntary sale of goods (like illegal drugs) or services (such as prostitution, gambling, and loan sharking).¹⁵⁴

In short, the Nelson/Pushaw proposal would allow almost all major Commerce Clause legislation, but through the application of precise legal rules that are grounded in the historical meaning of that Clause.¹⁵⁵ We would, however, impose certain limits. Most significantly for present purposes, “commerce” includes only voluntary (not required) market-oriented actions.¹⁵⁶ Furthermore, “commerce” excludes acts done to satisfy individual or home needs.¹⁵⁷ For example, we would permit Congress to regulate the production of agricultural commodities that are intended for sale in the marketplace, but not the growth of wheat and marijuana for personal use (contrary to *Wickard* and *Raich*). Finally, our interpretation bars Congress from interfering with the states’ control over purely moral, social, or cultural matters (such as violent crime).¹⁵⁸

Application of our two-pronged Commerce Clause legal framework would have led to upholding almost all of the ACA. First, Congress can legislate about health insurance, which involves selling products and services in the market. Indeed, we have always maintained that Congress can regulate insurance, which has long been a vital “branch of commerce” (to use a common eighteenth-century phrase).¹⁵⁹ Second, medical insurance plainly has effects “among the States.” Yet one critical provision of Obamacare—the IM—would be invalid, as Congress cannot force people to buy insurance because such contracts would not be *voluntary* sales. As the IM does not regulate “commerce,” it is unnecessary to proceed to the second step and determine interstate economic impacts.

Before the ACA, Congress implicitly grasped the volitional nature of

152. *See id.* at 9, 120–24.

153. *Id.* at 9–10, 119–20, 124–25.

154. *Id.* at 10, 125–41. Finally, Congress can protect specifically identified persons and entities engaged in interstate commerce (such as retail stores and abortion clinics) against criminal or tortious misconduct. *See id.* at 10 n.40, 147–58.

155. By contrast, the Court has ignored the Clause’s language and history in cobbling together the “substantial effects”/“aggregation”/“rational basis” test, with recent exceptions for “noncommercial” conduct and “inactivity” (terms that are never defined). *See supra* Subsections I.A.1–2.

156. Nelson & Pushaw, *supra* note 38, at 9, 107.

157. *Id.* at 109–10.

158. *Id.* at 10–12, 27, 41, 78, 109–10.

159. *Id.* at 10, 13, 15, 17, 19, 85, 108.

“commerce” because it never ordered Americans to buy specific items.¹⁶⁰ To ignore this basic element of free will and approve the IM would open up a Pandora’s Box in which Congress could compel all citizens to purchase anything (be it a refrigerator, legal services, or whiskey)¹⁶¹ on the theory that their failure to enter such markets is actually “commercial” activity that “substantially affects” the interstate economy.¹⁶²

In sum, the Nelson/Pushaw approach would have led to the same result as that reached by Chief Justice Roberts and his Republican cohorts, but through a straightforward application of clear legal rules rooted in the Commerce Clause. Because we set forth our analysis long before Obamacare was enacted, we cannot be accused of inventing a new test (such as the “activity vs. inactivity” distinction) to justify a preferred political outcome. The Court would be wise to “tie itself to the mast” in a similar manner by precommitting itself to abide by fixed legal rules.

160. See *supra* notes 7, 71–76, 95–99, 107–09, 135 and accompanying text.

161. Professor Dorf argues that the Court in *National Federation* could have limited mandates to “economic” activity (such as purchasing goods) rather than “noneconomic” activity (for example, consuming products like food). Dorf, *supra* note 137, at 905–09. The Commerce Clause, however, authorizes Congress to regulate only “commerce” (*voluntary* market-based activity), not compelled transactions that might have an “economic” impact. See Pushaw, *supra* note 94, at 1706–10, 1743–54.

162. Our approach prevents Congress from addressing any perceived national problem however it wishes. Although critics would consider such constraints a vice, I think they are a virtue because they preserve the constitutional system of limited and enumerated powers. For instance, Congress can regulate medical insurance, but must do so within the bounds of the Commerce and Necessary and Proper Clauses. Interpreting those provisions as giving Congress total discretion over health care and insurance would allow mandates to purchase not only insurance but also fruits and vegetables, gym memberships, sleep aids, and anything else our federal legislators deem beneficial. Permitting the exercise of such power removes any limits on the federal government and concomitantly erodes individual liberty. See Pushaw, *supra* note 94, at 1753 (summarizing the foregoing argument).

Critics would respond that such fears are baseless because the democratically accountable federal legislators will not go to such extremes. See, e.g., Karlan, *supra* note 23, at 50–51. That point is well taken, but the political process does not always function properly, as the ACA itself illustrates. For example, Congress short-circuited its ordinary procedures to get Obamacare through. See *id.* at 45 (acknowledging that Congress resorted to using the budget reconciliation mechanism, rather than its usual legislative process, to avoid filibusters). Moreover, the President and his legislative allies insisted that the IM was not a “tax,” but the Court concluded that it was, thereby diminishing Congress’s accountability for raising taxes. See *supra* note 138 and accompanying text.

Finally, legislation that might seem farfetched today, but that is supported by elite opinion, can acquire mainstream status fairly rapidly (witness the sea change over the past decade regarding same-sex marriage). Perhaps local bans on unhealthy food (such as soda) are a harbinger of national change.

B. *The Taxing Clause*

Chief Justice Roberts, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, held that the IM could reasonably be characterized as a “tax” and was a valid exercise of Congress’s Taxing Power.¹⁶³ The remaining four Justices, however, persuasively rejected this interpretation as implausible.¹⁶⁴ I will explain my agreement with the dissenters after reviewing the relevant legal background and the competing opinions.

1. The Taxing Power: History and Precedent

Article I authorizes Congress “[t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁶⁵ The Taxing Clause enabled the new national government to finance its operations by taxing individuals and private entities directly. By contrast, the Articles of Confederation had relied upon states to voluntarily comply with Congress’s requisition requests, which resulted in disastrous free rider and collective action problems that bankrupted the central government.¹⁶⁶

The Taxing Clause confers fiscal power to raise revenue and, unlike the Commerce Clause, does not grant independent regulatory authority (beyond regulations necessary to assess and collect taxes).¹⁶⁷ Nonetheless, it has always been understood that taxes often both generate funds for the government and promote a regulatory goal, such as protecting American industries.¹⁶⁸ Thus, the Court has long sustained tax measures as long as they raised revenue, even if they also had a

163. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594–601 (2012) (Roberts, C.J.); *accord id.* at 2609 (Ginsburg, J., concurring in part, dissenting in part). The Court appeared to rely heavily on, but did not cite, the analysis set forth by Cooter & Siegel, *supra* note 10, at 1196–200, 1236–53.

164. *See Nat’l Fed’n*, 132 S. Ct. at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting); *see also* Barnett, *Commandeering*, *supra* note 16, at 607–14 (setting forth the arguments that were later adopted by the joint dissent).

165. U.S. CONST. art. I, § 8, cl. 1; *see also* THE FEDERALIST NO. 45 (James Madison) (contending that this Clause had the modest purpose of ensuring that the federal government had adequate revenue to pay off its debts, fund the military, and promote America’s welfare primarily by facilitating international commerce).

166. For descriptions of how the Constitution addressed this problem of ensuring that the federal government had adequate revenue, *see* Nelson & Pushaw, *supra* note 38, at 22–25, 34; Cooter & Siegel, *supra* note 10, at 1200–04.

167. *See Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36–37 (1922).

168. *See* Nelson & Pushaw, *supra* note 38, at 22–25, 34, 50–51 (citing examples of this understanding dating back to the Founding); Cooter & Siegel, *supra* note 10, at 1200–10 (concluding that the Constitution was designed to provide for ample taxing power, which has always been exercised both to raise revenue and to achieve regulatory ends, such as tariffs to stimulate domestic manufacturing).

regulatory purpose or effect.¹⁶⁹ For example, in *United States v. Kahriger*,¹⁷⁰ the Court upheld a \$50 annual tax on persons engaged in the gambling business because this levy yielded revenue, even though the amount was trivial and the law had the regulatory effect of discouraging gambling.¹⁷¹ The Court declared that “[t]he remedy for excessive taxation is in the hands of Congress, not the courts.”¹⁷² In *Kahriger* and other cases, the Court justified its deference on the ground that Congress had explicitly described the exaction as a “tax” and therefore would face the political consequences of taxation.¹⁷³ This electoral accountability helps explain why the Court has not invalidated any federal legislation as exceeding the Taxing Power since the *Butler* case in 1936.¹⁷⁴

No constitutional power is absolute, however. Most obviously, the Taxing Clause limits Congress to laying and collecting “taxes.” Congress cannot make any charge a “tax” merely by labeling it as such,¹⁷⁵ just as Congress cannot magically transform noncommercial activity (like sexual assault) into “commerce” merely by asserting that it is.¹⁷⁶ Furthermore, the Taxing Clause allows Congress to impose a “penalty” (that is, a coercive monetary punishment) solely for failure to meet one’s tax obligations (for instance, late filing), not for violations of other federal laws enacted under different powers such as the Commerce Clause.¹⁷⁷

A related point is that a federal statutory provision designated as a “tax” may be struck down if it is in reality a “penalty” devised to punish

169. See, e.g., *Bailey*, 259 U.S. at 38; see also *Sonzinsky v. United States*, 300 U.S. 506, 512–14 (1937) (upholding a statutory “tax” on firearms that was particularly onerous as to certain types of guns, even though Congress also had a regulatory aim); *McCray v. United States*, 195 U.S. 27 (1904) (sustaining a statute that imposed a vastly higher tax on artificially colored yellow margarine than butter on the ground that the law produced revenue and that Congress had the legitimate objective of discouraging adulteration of food products, despite the fact that this tax also had the purpose of preferring manufacturers of butter rather than margarine).

170. 345 U.S. 22 (1953).

171. See *id.* at 25–31.

172. *Id.* at 28; see also Barnett, *Commandeering*, *supra* note 16, at 609 (arguing that *Kahriger* illustrated the Court’s post-New Deal approach of deferring to Congress’s assertion that it was exercising its Taxing Power, even if there also may have been a regulatory motive).

173. See *Kahriger*, 345 U.S. at 28; *Sonzinsky*, 300 U.S. at 513–14.

174. See *United States v. Butler*, 297 U.S. 1, 68 (1936) (striking down a tax imposed under the Agricultural Adjustment Act on processors of farm products as violating the Tenth Amendment, which reserves agricultural production to the states). The Court permanently reversed course the next year. See *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590–93 (1937) (upholding the Social Security Act’s tax scheme for unemployment compensation).

175. See Erik M. Jensen, *The Individual Mandate and the Taxing Power*, 134 TAX NOTES 97, 103, 108 (2012).

176. See *United States v. Morrison*, 529 U.S. 598, 614–18 (2000).

177. Jensen, *supra* note 175, at 103–04.

someone monetarily for violating a law intended to achieve a regulatory purpose. For instance, in the seminal case of *Bailey v. Drexel Furniture Co.*,¹⁷⁸ the Court invalidated a purported “tax” on employers who had used child labor because it was actually a “penalty” for violating the regulatory provision prohibiting such labor.¹⁷⁹ Relevant factors in making this determination included the large amount of the exaction, the scienter requirement (i.e., employers would be liable only if they knew the worker was underage), and the law’s enforcement by a government agency other than the IRS (here, the Department of Labor).¹⁸⁰

Significantly, Congress resorted to the fiction that the regulatory penalty for employing a child was a “tax” because the Court had narrowly construed the Commerce Clause as not permitting labor legislation, much less penalties for violating such laws.¹⁸¹ When the Court in 1937 abandoned that interpretation (and all serious judicial review of the Commerce Clause), Congress could simply attach penalties to its regulatory statutes without invoking the Taxing Power—as it did in the ACA.¹⁸²

In brief, when Congress “lays and collects taxes,” courts will approve such laws as long as they raise revenue (which they invariably do). Judicial review should be more searching, however, when the plaintiff claims that Congress has not actually exercised its Taxing Power, but rather has imposed a “penalty” for violating a regulatory statute enacted pursuant to the Commerce Clause. Obamacare fell squarely into that category.

2. The *National Federation* Decision

The ACA triggered massive litigation. Every lower federal court that considered whether the IM could be sustained as an Article I “tax” for the “general Welfare” held that it could not because (1) Congress explicitly disavowed reliance on the Taxing Clause and instead invoked its Commerce Power; (2) the ACA repeatedly referred to the IM as a regulatory “penalty,” not a “tax”; and (3) Supreme Court precedent dictated treating the IM as a “penalty.”¹⁸³ The federal courts’ opinions,

178. 259 U.S. 20 (1922).

179. *Id.* at 31–37.

180. *See id.* at 36–38; *see also* *Dep’t of Revenue v. Kurth Ranch*, 511 U.S. 767, 779–82 (1994) (reaffirming that a purported “tax” would be treated as a “penalty” when it was really intended to regulate behavior through punishment).

181. *See* *Hammer v. Dagenhart*, 247 U.S. 251, 272–76 (1918) (invalidating the Child Labor Act).

182. *See* *Jensen*, *supra* note 175, at 102–03, 109.

183. *See, e.g.,* *Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1313–20 (11th Cir. 2011) (articulating this rationale and noting that every federal court had reached the same conclusion). Indeed, the inapplicability of the Taxing Power was clear

and the unanimity of their decisions, reflect their view that the IM clearly was not a tax and hence could not be upheld under the Taxing Clause.¹⁸⁴ Therefore, it was surprising that Chief Justice Roberts, in a majority opinion joined by the four liberals, rejected this seemingly obvious conclusion.¹⁸⁵

This judgment was especially perplexing in light of the Court's initial 9–0 jurisdictional ruling that the Anti-Injunction Act (AIA), which prohibits federal courts from enjoining “the assessment or collection of any tax,” did not apply because Congress had described the IM payment as a “penalty,” not a “tax.”¹⁸⁶ This consensus broke down when the Chief Justice and his four liberal colleagues insisted that, even though this “penalty” label settled the *statutory* issue of whether Congress intended the AIA to extend to the ACA, this choice of words did not determine whether the payment might be regarded as an exercise of Congress's *constitutional* power to tax.¹⁸⁷

a. Chief Justice Roberts's Majority Opinion

Roberts conceded that the most “straightforward” and “natural” reading of the IM is that it commands Americans to buy health insurance as a regulation of interstate commerce and penalizes anyone who fails to do so.¹⁸⁸ Nevertheless, he invoked the Court's canon of construing statutes to avoid unconstitutionality if such an interpretation was “fairly possible,” and ruled that the IM could reasonably be characterized as levying a tax on those who do not purchase health insurance—and hence within the Taxing Power.¹⁸⁹ The majority found this alternative construction to be plausible because the IM exaction (1) was paid by taxpayers to the IRS, which had to assess and collect it “in the same manner as taxes,”¹⁹⁰ and (2) “produces at least some revenue for the Government.”¹⁹¹

even to judges like Jeffrey Sutton, who upheld the IM under the Commerce Clause. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529, 550–52 (6th Cir. 2011) (Sutton, J., concurring); *see also supra* note 102 (discussing Judge Sutton's Commerce Clause analysis).

184. *See, e.g., Florida v. HHS*, 648 F.3d at 1314 (contrasting this clarity and unanimity with the lower federal courts' divisions on the complex Commerce Clause issues).

185. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593–600 (2012).

186. *Id.* at 2582–84; *id.* at 2609 (Ginsburg, J., concurring in part, dissenting in part); *id.* at 2655–56 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

187. *Id.* at 2594, 2597–98 (Roberts, C.J.). Justice Ginsburg tersely agreed with the Chief Justice's opinion on the Taxing Power. *Id.* at 2609 (Ginsburg, J., concurring in part, dissenting in part). On this issue, then, Roberts spoke with one voice for the majority.

188. *Id.* at 2593–94 (Roberts, C.J.).

189. *Id.* at 2593–94, 2600–01. *But see id.* at 2651 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (recognizing this canon of statutory construction, but concluding that the IM could be plausibly interpreted only as a “penalty,” not a “tax”).

190. *Id.* at 2594 (Roberts, C.J.) (citing ACA, 26 U.S.C. § 5000A(g)(1)).

191. *Id.* (citing *United States v. Kahriger*, 345 U.S. 22, 28 n.4 (1953)).

Moreover, the majority asserted that it did not have to accept the ACA's own description of the IM as a "penalty" rather than a "tax," because precedent indicated that such congressional labels did not resolve the question of constitutional power.¹⁹² For example, in *Drexel Furniture*, the Court concluded that a required payment which Congress had designated as a "tax" was not a permissible exercise of the Taxing Power.¹⁹³ Conversely, in the *License Tax Cases*,¹⁹⁴ a fee that the statute deemed a "license" (to sell liquor and lottery tickets) was upheld under the Taxing Clause.¹⁹⁵

This precedent led the Court to adopt a "functional" approach to the ACA based on *Drexel Furniture*'s three factors, which suggested that the IM could be considered a "tax."¹⁹⁶ First, the amount of the exaction was small—typically far less than the price of insurance.¹⁹⁷ Second, the IM contained no scienter requirement, unlike statutes which featured regulatory penalties.¹⁹⁸ Third, this law was enforced by the IRS through its normal collection mechanism, but with no punitive sanctions.¹⁹⁹ Furthermore, the Court noted that a "penalty" punished an illegal act, whereas here Congress did not treat the failure to buy insurance as unlawful and deserving of sanction (as contrasted with merely making a relatively modest payment to the IRS).²⁰⁰ Thus, Congress's use of the word "penalty" in the IM did not preclude deeming the payment a "tax,"²⁰¹ and such an interpretation was reasonable.²⁰²

192. *See id.* at 2594–95.

193. *See id.* (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 38 (1922)).

194. 72 U.S. (5 Wall.) 462 (1866).

195. *Nat'l Fed'n*, 132 S. Ct. at 2595 (Roberts, C.J.) (citing 72 U.S. at 471).

196. *Id.*

197. *Id.* at 2595–96.

198. *Id.* at 2596.

199. *Id.*

200. *See id.* at 2596–97. The Court relied upon *New York v. United States*, 505 U.S. 144 (1992), which examined an Act of Congress that began with a general statement that each state "shall be responsible" for disposing of radioactive waste and then specifically (1) imposed a "surcharge" on a state that shipped such waste to another state, with part of the money going to the receiving state and part deposited in the U.S. Treasury; and (2) imposed "penalties" on states that did not comply. *See Nat'l Fed'n*, 132 S. Ct. at 2597 (Roberts, C.J.) (citing *New York*, 505 U.S. at 152–53, 169). The Court read this statute as giving states "incentives" to dispose of radioactive waste and deemed the "surcharge" to be a legitimate exercise of the Taxing Power. *Id.* at 2597 (citing *New York*, 505 U.S. at 169–74).

However, the Court in *New York* merely declined to interpret the law's introductory provision—reciting that each state "shall be responsible" for disposing of radioactive waste—in isolation as a command, but rather focused on the later operative provisions of the statute, which indicated that such disposal would be part of a taxing and spending scheme. *Id.* at 2652 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). By contrast, in the ACA, the mandate that individuals "shall" purchase insurance appeared "in the dispositive operative provision." *Id.* Hence, the *New York* case was inapposite.

201. *Nat'l Fed'n*, 132 S. Ct. at 2597–98 (Roberts, C.J.).

202. *Id.* at 2600.

Finally, the majority ruled that the IM did not run afoul of the Article I provision that “[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed.”²⁰³ According to the Court, the IM was not a “direct tax”—a category that included only “head” taxes imposed on everyone and those assessed against land or personal property.²⁰⁴ Nor was the IM unusual, as Congress had previously taxed inactivity (as with head taxes) and had used the Taxing Power to encourage Americans to buy things (such as homes).²⁰⁵ Although the Chief Justice cautioned that this power could not be exercised in such a manner as to impose a penalty and could be used only to require a person to pay taxes, he concluded that the IM did not exceed those limitations.²⁰⁶

b. The Dissent

Justices Scalia, Kennedy, Thomas, and Alito argued that the IM could only be plausibly construed as a Commerce Clause regulation backed up by a “penalty” (an exaction as punishment for an unlawful act), not as a “tax” (an enforced contribution to support the government).²⁰⁷ These four Justices derided as “remarkable” the majority’s position that the IM was not a tax under the AIA, but was a tax under the Taxing Power.²⁰⁸ Similarly, the dissenters attacked the Court’s assertion that, for constitutional purposes, the IM could be both a “penalty” (in the Commerce Clause context) and a “tax” (pursuant to the Taxing Clause), because all of the relevant cases had established that these two terms were mutually exclusive.²⁰⁹ Most significantly, the Court had never before held that a “penalty” for violation of the law was so trivial that it could be dubbed a “tax.”²¹⁰

The dissenting Justices concluded that the IM was “unquestionably” a penalty, for four related reasons.²¹¹ First, Congress provided that every covered individual “shall” (i.e., must) obtain “minimum essential coverage” and that anyone who failed to meet this “requirement” would suffer a “penalty.”²¹² Second, Congress’s findings repeatedly confirmed that the IM set forth a “penalty” for the violation of a legal requirement that flowed from the exercise of purely commercial regulatory (not

203. *Id.* at 2598–99.

204. *Id.*

205. *Id.* at 2599.

206. *Id.* at 2599–600.

207. *Id.* at 2650–55 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

208. *Id.* at 2656.

209. *Id.* at 2651.

210. *Id.*

211. *Id.* at 2652.

212. *Id.*

taxing) power.²¹³ Third, Congress consciously chose to treat the IM as a “penalty” (a word repeated eighteen times in the ACA) rather than a “tax.”²¹⁴ Fourth, because Congress explicitly “imposed . . . a penalty” for not purchasing insurance, such a failure was automatically “unlawful” under longstanding precedent (contrary to the majority’s claim that it was not).²¹⁵ Indeed, the Court had “never . . . classified as a tax an exaction imposed for violation of the law . . . [or] described in the legislation itself as a penalty,” although some cases had treated as a tax a required payment for something other than an unlawful act (such as a “license” or “surcharge”).²¹⁶

Justices Scalia, Kennedy, Thomas, and Alito contrasted this “mountain of evidence” that the IM was a regulatory “penalty” with the Government’s “flimsiest of indications to the contrary.”²¹⁷ For instance, the Government emphasized that the IM penalty could be viewed as a “tax” because it was assessed and collected by the IRS.²¹⁸ The dissenters demonstrated, however, that the IRS often enforced penalties, and that the Court had routinely determined that such IRS collection did not transform such “penalties” into “taxes.”²¹⁹ Moreover, the IM was also administered by the Department of Health & Human Services and the Secretary of Veteran Affairs, which would be “quite extraordinary for taxes.”²²⁰ Similarly, the dissenting Justices found misplaced the Government’s reliance on the fact that the IM amount varied according to income, because penalties are often adjusted based upon ability to pay.²²¹ Furthermore, the absence of a scienter requirement did not suggest a tax, because the Government frequently imposed penalties for acts or omissions without requiring proof of intent.²²² Lastly, the dissenters pointed out that the IM and related penalty were located in Title I of the ACA (its operative core), rather than in Title IX (“Revenue Provisions”), where a tax would be found.²²³

The foregoing analysis prompted the dissenting Justices to fault the Court for confusing what Congress actually did in the IM (imposed a

213. *Id.*; see also *id.* at 2655 (noting that Congress had rejected an earlier version of Obamacare “that imposed a tax instead of a requirement-with-penalty”).

214. *Id.* at 2653.

215. *Id.* at 2652.

216. *Id.* at 2653. The dissenters added that, if the IM were actually a “tax,” it would have made no sense for Congress to exempt some individuals from that tax who were not exempt from the mandate. *Id.*

217. *Id.* at 2654.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 2654–55.

223. *Id.* at 2655.

penalty for violation of a regulatory law passed under the Commerce Clause) with what Congress could have done (drafted a different statute pursuant to the Taxing Power).²²⁴ The dissenters accused the majority of “rewriting” rather than interpreting the statute.²²⁵

Because the dissenters rejected the conclusion that the IM had been enacted as a tax, they did not have to “confront [the] difficult constitutional question whether this is a direct tax that must be apportioned among the States according to their population.”²²⁶ They chided the majority for deciding that issue without the benefit of proper briefing and argument.²²⁷

3. The Court’s Curious Approach to the Taxing Power

The critique of the majority opinion by Justices Scalia, Kennedy, Thomas, and Alito is devastating. Chief Justice Roberts cleverly attempted to weaken its force by admitting that the dissenters presented the most “natural” reading of the ACA and asserting that he merely had to offer another construction that was “reasonable.”²²⁸ But the possibility of plausible competing interpretations arises only where a legal text is ambiguous. For instance, a statute or contract using the word “Carolina” might sensibly refer to either North Carolina or South Carolina. However, “Montana” could have but one meaning.

Likewise, the IM can reasonably be construed only as a regulatory “penalty,” enacted under the Commerce Clause, designed to punish the violation of the statutory requirement to purchase health care insurance.²²⁹ That is exactly what the IM says,²³⁰ and the rest of the ACA reinforces this clear meaning by referring to the IM as a “penalty” eighteen times²³¹ (and never as a “tax”).²³² Obamacare’s legislative history confirms this conclusion. The House and Senate rejected earlier

224. *Id.* at 2651.

225. *Id.* at 2655 (leveling this charge, and stressing that the judiciary, as the least accountable branch, should never write tax legislation).

226. *Id.* (citing U.S. CONST. art. I, § 9, cl. 4).

227. *Id.*

228. *Id.* at 2593–94 (Roberts, C.J.).

229. See Jensen, *supra* note 175, at 98–110, 120; see also Ilya Shapiro, *Like Eastwood Talking to a Chair: The Good, the Bad, and the Ugly of the Obamacare Ruling*, 17 TEX. REV. L. & POL. 1, 11–12, 16 (2013) (arguing that the ACA was clear and that therefore it was incorrect to invoke the canon of interpreting ambiguous statutes to avoid constitutional questions).

230. See ACA, 26 U.S.C. § 5000A(a)–(b) (2012) (providing that every applicable individual “shall” obtain “minimum essential coverage” and that those who “fail” to meet the requirement “will be assessed “a penalty”).

231. See *supra* note 214 and accompanying text.

232. See Jensen, *supra* note 175, at 106 (remarking that the word “tax” appeared in other parts of the ACA, thereby suggesting that Congress referred to the IM as a “penalty” to convey a different meaning); *id.* at 99, 102, 105–06 (noting that the IM penalty had no taxing or revenue-raising purpose, but simply supported the commercial regulatory scheme).

versions of the law that treated the IM as a tax under the Taxing Power,²³³ undoubtedly because of the negative political consequences of raising taxes. Instead, Congress deliberately chose to enact the mandate as a “penalty” as part of a larger regulation of interstate commerce.²³⁴ Moreover, President Obama and his legislative supporters repeatedly assured Americans that the IM was not a “tax.”²³⁵ The Court’s assertion that the IM “penalty” is a “tax” is as misguided as construing “Carolina” to mean “Montana.” Moreover, because the mandate is a “penalty,” it cannot simultaneously be a “tax.”²³⁶ That is a legal impossibility, like a jury rendering a verdict that both convicts and acquits a defendant of a crime.

In an attempt to dodge this seemingly inescapable conclusion that the IM is a “penalty,” the majority offered several arguments. The only one that had a colorable legal basis was that the IM payment might be deemed a “tax” because it was collected by the IRS and produced revenue.²³⁷ Concededly, “taxes” have those two characteristics. But so do “penalties.”²³⁸ Put differently, the fact that the IM “penalty” is collected by the IRS and generates revenue does not turn it into a “tax.”²³⁹

The majority’s other assertions are legally unsupportable. Perhaps most dubious was Chief Justice Roberts’s claim that the IM was a “penalty” for purposes of the AIA and Commerce Clause, but somehow became a “tax” under the Taxing Power.²⁴⁰ The pertinent precedent uniformly characterizes a government exaction as *either* a penalty *or* a tax, and the Court has never interpreted a statutory provision expressly imposing a “penalty” as a “tax.”²⁴¹ Similarly counterintuitive was the

233. See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 501 (2009); America’s Healthy Future Act of 2009, S. 1796, 111th Cong. § 1301; see also Jensen, *supra* note 175, at 97–98, 105–06 (emphasizing that the IM calls the charge a “penalty,” whereas earlier bills referred to the mandate as an income or excise “tax”).

234. See *supra* notes 4, 19–20, 188, 207–25, 228–33 and accompanying text.

235. See Barnett, *Commandeering*, *supra* note 16, at 632–33; see also Karlan, *supra* note 23, at 45–47, 50 (acknowledging these assurances, but defending the IM under the Taxing Power).

236. See *supra* notes 209–10 and accompanying text.

237. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2594 (2012) (Roberts, C.J.).

238. See *supra* notes 217–19 and accompanying text.

239. See Jensen, *supra* note 175, at 97, 102; see also Barnett, *Commandeering*, *supra* note 16, at 610–13 (arguing that (1) the IM “penalty” did not become a “tax” merely because Congress inserted it into the Internal Revenue Code, and (2) the ACA and its legislative history nowhere identified the purpose of the penalty as raising revenue). Ilya Shapiro makes a similar point and adds that Chief Justice Roberts’s conclusion that the IM has no scienter requirement contradicts his assertion that people can choose either to buy insurance or pay the tax, because a “choice” by definition involves scienter. See Shapiro, *supra* note 229, at 13.

240. Nat’l Fed’n, 132 S. Ct. at 2593–94, 2597–98 (Roberts, C.J.).

241. See *supra* notes 209–10 and accompanying text. Dean Minow reconciles those

majority's denial that the failure to buy health insurance was unlawful.²⁴² Again, all relevant legal authority holds that, when a statute imposes a "penalty" for an act or omission, such conduct is unlawful *per se*.²⁴³

Of course, Chief Justice Roberts was correct in observing that the label Congress attaches to an exaction—whether it be "tax," "penalty," "fee," or "license"—does not determine whether it was passed under the Taxing Clause.²⁴⁴ Rather, the dispositive factor is Congress's intent. The IM's language, considered in light of the ACA's structure and legislative history, plainly reveals that Congress intended the IM not to be a "tax" but rather a "penalty" that implemented a Commerce Clause regulation.²⁴⁵

In a nutshell, the IM "penalty" is not reasonably susceptible to being construed as a "tax." The Court reached the opposite conclusion by disregarding the obvious meaning of the ACA, not to mention its own case law.²⁴⁶ The Justices in the majority thereby left the impression that they were prepared to dream up any reading of the IM that would enable them to uphold it.

Such judicial legerdemain effectively grants Congress general police powers. *National Federation* suggests that the Court can always find that Congress implicitly relied upon the Taxing Clause to regulate subjects that do not fall within any enumerated power and that have always been left to the states. Political accountability under the Constitution, however, demanded that the Court effectuate Congress's declared intent not to enact the IM as an exercise of its Taxing Power, because the principal check on such power is the ability of citizens to determine whether or not they support tax increases for particular programs.²⁴⁷ Otherwise, as with Obamacare, Congress can promise

holdings as reflecting appropriate respect for Congress—deferring to its characterization of the IM as a "penalty" in interpreting the AIA, but treating the IM as a "tax" in the ACA to sustain it on constitutional grounds. See Minow, *supra* note 13, at 134. This argument might be persuasive if the IM could reasonably be interpreted as a "tax" in the Obamacare statute, but it cannot be.

242. See *Nat'l Fed'n*, 132 S. Ct. at 2596–97 (Roberts, C.J.).

243. See *supra* note 215 and accompanying text.

244. See *supra* notes 192–95 and accompanying text.

245. See Jensen, *supra* note 175, at 106–07.

246. See Reynolds & Denning, *supra* note 27, at 821 (decrying the majority's strained reading of precedent); Lawson, *supra* note 124, at 1712–13 (maintaining that Chief Justice Roberts exceeded the scope of Article III "judicial power" and usurped Congress's Article I "legislative power" by rewriting the ACA and then purporting to uphold a statute that Congress did not actually enact). Professor Magarian faults Chief Justice Roberts for failing to explain (1) why he was reviving the pre-New Deal notion that the Taxing Clause does not authorize Congress to impose "penalties," instead of following the Court's decades-long practice of allowing as a "tax" any measure that raises revenue; and (2) how "taxes" can meaningfully be distinguished from "penalties." See Magarian, *supra* note 26, at 22–26.

247. See *Nat'l Fed'n*, 132 S. Ct. at 2655 (Scalia, Kennedy, Thomas, and Alito, JJ.,

voters that its legislation does not impose taxes and hence avoid political repercussions, but can remain confident that the Court years later will alchemically transform the law into a tax.²⁴⁸

Finally, even assuming *arguendo* that the IM could reasonably be deemed a “tax” as a matter of statutory interpretation, it is not entirely clear that Congress has the constitutional power to enact such a tax. The Taxing Clause has always been understood as authorizing Congress to impose levies on the purchase of products (e.g., cigarettes and gasoline), but not to require Americans to buy specific items.²⁴⁹ Moreover, this Clause allows Congress to assess penalties only against those who fail to meet their tax obligations, not those who violate other federal rules (such as a mandate to obtain insurance).²⁵⁰ Perhaps most importantly, the IM appeared to be a “direct” tax because it did not fall within any other taxation category listed in the Constitution (duties, imposts, excises, or income)—a logical inference that the majority did not mention.²⁵¹ As such, Article I required this direct tax to be apportioned among the states based upon their population, whereas the IM was not.²⁵² More generally, an Article I tax cannot

attach to pure inactivity unrelated to earned or investment income, or to the [citizen’s] person or the ownership of property. The federal government has never taxed the failure . . . to engage in a particular type of transaction, for the simple reason that every person at any given time is *not* engaged in thousands of activities that could expose him to

dissenting); Barnett, *Commandeering*, *supra* note 16, at 613–14, 633; *see also* Eastman, *supra* note 22, at 19–20 (echoing this theme, and adding that the Constitution ensures political accountability for imposing taxes primarily by requiring that tax bills originate in the House of Representatives (whose members must face the voters every two years), whereas the Senate introduced Obamacare and rammed it through by invoking the highly unusual procedural mechanism of budget reconciliation).

248. Such a result cannot be justified as consistent with the Court’s practice of showing extraordinary deference to Congress on tax matters, because the very reason for such deference is that political accountability for raising taxes makes rigorous judicial review unnecessary. *See* Barnett, *Commandeering*, *supra* note 16, at 610–14; Jensen, *supra* note 175, at 105–07; *see also supra* notes 172–74 and accompanying text (describing such judicial deference and its underlying rationale).

249. *See* Jensen, *supra* note 175, at 97–101, 120.

250. *Id.* at 103–04; *see also supra* note 177 and accompanying text.

251. *See* Eastman, *supra* note 22, at 20; Shapiro, *supra* note 229, at 17–18. Duties, imposts, and excises are “indirect” taxes that must be assessed uniformly across the nation. *See* Jensen, *supra* note 175, at 110. All other taxes are “direct” and must be apportioned by population, except for those on income. *Id.* The IM is not a tax on income, even if it is filed with one’s tax return, because the penalty for many people is not calculated based on their income. *Id.* at 117–19.

252. *See* Barnett, *No Small Feat*, *supra* note 16, at 1340; Jensen, *supra* note 175, at 111–20; Reynolds & Denning, *supra* note 27, at 821–22.

taxes from all sides.²⁵³

The Court's cursory treatment of the "direct tax" issue, and its failure to acknowledge the unprecedented nature of the IM "tax," indicate that it will continue to treat the Taxing Power as virtually plenary.

To be sure, Chief Justice Roberts did acknowledge one constitutional limit: A "tax" cannot be so high as to be in reality a "penalty."²⁵⁴ But he declined to identify the amount of that tipping point, undoubtedly to give Congress (and the Court) ample latitude in the future. That opaqueness, along with his strained construction of the ACA and his breezy treatment of serious constitutional taxing problems, provides little hope that the Court will ever enforce any restrictions on Congress's ability to tax.²⁵⁵

4. Scholarly Defenses of the Majority Opinion: A Critical Appraisal

Several distinguished professors have endorsed the Court's holding that the IM was a valid exercise of the Taxing Power.²⁵⁶ Most notably,

253. See Epstein, *supra* note 17, at 39; Shapiro, *supra* note 229, at 15–16 (similar). For an opposing view, see Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 413–19 (2011) (arguing that (1) the Framers included the deliberately vague phrase "direct tax" as part of a compromise over slavery and expected it to be interpreted narrowly as not greatly limiting Congress's power to tax; (2) the IM is not a "direct" tax because it is not a head tax and can be avoided by buying insurance; and (3) the IM can be considered as an "income" tax because those subject to it pay a percentage of their income). Whatever the merits of the debate over direct taxes, the Court did not give this issue the attention it deserved.

254. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599–600 (2012).

255. Randy Barnett is more optimistic. He does lament that the Court undermined the political constraints on the Taxing Power and allowed Congress to tax inactivity. Barnett, *No Small Feat*, *supra* note 16, at 1340–41. Nonetheless, he asserts that Chief Justice Roberts did not sustain Congress's power to tax by imposing indirect economic mandates because Roberts creatively interpreted the IM's legal *requirement* to buy insurance as a mere *option* to do so or pay a small penalty. *Id.* at 1337–38. However, Roberts cautioned that a higher amount (or the threat of imprisonment) would be coercive and hence a forbidden "penalty," which Barnett sees as a meaningful limit on Congress's constitutional power to tax. *Id.* at 1339. I will remain skeptical until the Court actually strikes down a law.

256. See, e.g., Metzger, *supra* note 24, at 85, 91–92 (approving this holding on the grounds that (1) the Court had long recognized that the Taxing Power was remarkably broad, and (2) the ACA mentioned the tax code, and the IM penalty was paid as part of an income tax return). Indeed, some scholars had been making similar claims ever since the ACA was enacted. See, e.g., Jack M. Balkin, *Tax Power: The Little Argument That Could*, CNN (June 30, 2012, 10:21 AM), <http://www.cnn.com/2012/06/28/opinion/balkin-health-care> (noting that he had been contending for three years that the IM was a constitutional tax); Akhil Amar, *Constitutional Objections to Obamacare Don't Hold Up*, L.A. TIMES (Jan. 20, 2010), <http://articles.latimes.com/2010/jan/20/opinion/la-oe-amar20-2010jan20> (defending the ACA under the Taxing Clause); Galle, *supra* note 253, at 408–13 (pointing out that Congress need not invoke the word "taxes" to exercise its constitutional power to tax, and that in any event the

Robert Cooter and Neil Siegel praise Chief Justice Roberts for distinguishing “taxes” from “penalties” based on practical considerations such as the amount at stake and scienter requirements.²⁵⁷ Professors Cooter and Siegel argue that exactions often fall on a spectrum.²⁵⁸ On one end, a “pure penalty” is coercive: It expresses condemnation of the assessed conduct and effectively (1) prevents such behavior by imposing a high cost relative to the expected gains from the conduct; (2) increases the amount charged for intentional or repeated infractions; and (3) raises little or no revenue.²⁵⁹ On the other end, a “pure tax” (e.g., on income) permits action but dampens it and generates significant revenue because the tax is less than the contemplated benefit from the conduct.²⁶⁰ However, some exactions (like the IM) combine aspects of a “penalty” and a “tax,” and they should be interpreted according to their “effect” and “material characteristics”—not based on labels used in the statute or congressional intent.²⁶¹

Professors Cooter and Siegel conclude that, although the IM has the expressive features of a “penalty” (by condemning the failure to purchase health insurance), it has the effect and material characteristics of a “tax” because it (1) noncoercively dampens but does not prevent conduct (failing to buy insurance), since the amount of the exaction is less than the gain realized by remaining uninsured; (2) raises substantial revenue; and (3) contains no *mens rea* requirement and does not impose a surcharge for intentional or repeated failures to purchase insurance.²⁶²

Cooter and Siegel’s original and creative thesis provides an intellectual justification for sustaining the ACA under the Taxing Clause, but is not firmly grounded in that Clause’s text, history, and precedent. Most tellingly, these scholars cite no legal authority for their proposed category of “mixed exactions.” On the contrary, the Court has always treated an exaction as either a “tax” or a “penalty.”²⁶³

ACA often refers to “taxes”). *But see* Barnett, *Commandeering*, *supra* note 16, at 607–09 (describing, but rejecting, the efforts of scholars and congressional staffers to portray the IM as a “tax”).

257. *See* Cooter & Siegel, *supra* note 10, at 1197–200, 1247–53. Initially, they maintain that the Court has long struggled to differentiate a “tax” from a “regulation backed by a penalty” and that the cases, while inconsistent, reveal that (1) this distinction cannot turn on whether an exaction raises revenue or regulates behavior (because taxes and penalties both have this effect); (2) the critical element of a “penalty” is its coercive nature; and (3) an exaction’s “material characteristics” matter far more than the formal label attached to it. *See id.* at 1210–22.

258. *See id.* at 1198.

259. *See id.* at 1198–99, 1222–24, 1226, 1253.

260. *See id.* at 1198–99, 1222–24, 1226, 1252.

261. *See id.* at 1198–200, 1220–21, 1226–33, 1247–53.

262. *See id.* at 1198, 1226–28, 1236–53.

263. *See supra* notes 209–10, 216, 241 and accompanying text. Perhaps the Court’s “two category” approach is simplistic and should be changed to include mixed exactions, but that criticism does not alter the existing precedent.

Furthermore, the Court has never held that a statutory “penalty” was actually a “tax,”²⁶⁴ and it has invariably defined a “penalty” as a punishment for violating a regulatory law.²⁶⁵ The IM precisely meets that definition: The ACA manifested Congress’s unmistakable intent to penalize individuals who violated its commercial regulatory legal requirement to purchase health insurance.²⁶⁶ Professors Cooter and Siegel seek to avoid this seemingly inevitable conclusion with three pragmatic arguments.

First, they contend that interpretation of an exaction should focus not on congressional intent, but rather on the exaction’s effects and material characteristics.²⁶⁷ But the interpretation of any legal document is the process of discerning and effectuating the intent of its drafters.²⁶⁸ Thus, to ignore legislative intent is to rewrite a statute such as the ACA.

Second, Professors Cooter and Siegel claim that the IM does not punish violation of the legal mandate to buy insurance, but rather merely charges a fee to individuals who determine that ignoring this requirement promotes their economic self-interest.²⁶⁹ This assertion, which Chief Justice Roberts echoed,²⁷⁰ conceptualizes obeying the law not as a moral duty but rather as a cold financial calculus.²⁷¹ Not surprisingly, before *National Federation* the Court had encouraged respect for the law by uniformly construing statutes that imposed a “penalty” for action (or inaction) as making such conduct “unlawful” *per se*.²⁷²

Third, Cooter and Siegel acknowledge the concern that Congress might escape political accountability by calling an exaction a “penalty” in the political arena and a “tax” in court, but maintain that citizens are aware that Congress often deceptively characterizes laws (especially those involving taxes) and will hold it responsible when they believe they are paying too much.²⁷³ Although this position might be realistic, it is strange to urge the Court to pretend that an explicit “penalty” is a

264. See *supra* notes 210, 216 and accompanying text.

265. See *supra* notes 177, 207, 215 and accompanying text.

266. See *supra* notes 207, 211–16, 224–25, 229–36, 245 and accompanying text.

267. See Cooter & Siegel, *supra* note 10, at 1198–200, 1222–36.

268. See Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 635 (2005).

269. See Cooter & Siegel, *supra* note 10, at 1246–47.

270. See *supra* notes 199–200 and accompanying text.

271. See *Seven-Sky v. Holder*, 661 F.3d 1, 48–49 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (emphasizing that the IM does not merely create financial incentives to buy insurance but imposes a legal obligation to do so, and that courts should encourage people’s desire to be law-abiding and not assume that they are driven solely by economic motives). *But see* Cooter & Siegel, *supra* note 10, at 1246–47 (rejecting Judge Kavanaugh’s position).

272. See *supra* note 215 and accompanying text.

273. See Cooter & Siegel, *supra* note 10, at 1243–45.

“tax” because people know that Congress lies about tax legislation.²⁷⁴

Overall, Professors Cooter and Siegel rely more on *Realpolitik* and economics than law. Their approach has little foundation in either the original meaning of the Taxing Clause or its implementing precedent. Finally, the implicit embrace of their theory in *National Federation* enabled the Court to transform a “penalty” into a “tax” and thereby uphold a huge federal government program that took over matters formerly left to the states and private parties, a result that further eviscerated the Federalism Principle.²⁷⁵

5. Conclusion

The *National Federation* opinion and its scholarly defenses ultimately rest on the premise that the Taxing Power is extraordinarily broad. That proposition, however, establishes only that Congress perhaps *could* have imposed the IM as a “tax” pursuant to the Taxing Clause. But Congress chose not to do so and instead enacted the IM as a “penalty” under the Commerce Clause.²⁷⁶ This legislative decision was deliberate and substantive, not a careless or technical labeling of the exaction. The Court should have honored Congress’s intent and ruled that the IM did not involve an exercise of the Taxing Power.

C. The Spending Power

Between 1937 and 2011, the Court rubber-stamped every statute passed under the Taxing and Spending Clauses, which created the

274. Professors Cooter and Siegel recognize that courts should defer to Congress if it expressly disclaims use of the Taxing Power, but contend that such a disclaimer should not be inferred from Congress’s mere failure to specifically invoke this power or its use of the word “penalty” rather than “tax” (as in the ACA). *See id.* at 1228 & n.160. By contrast, I conclude that the ACA’s language and legislative history demonstrate that Congress clearly disavowed any reliance on the Taxing Clause, and that the Court should have given effect to that choice. *See supra* notes 229–36, 245–48 and accompanying text.

275. These two scholars make the counterintuitive assertion that their approach helps preserve federalism. *See Cooter & Siegel, supra* note 10, at 1245 n.222, 1253 n.256. They do not, however, explain how *National Federation* and Congress’s exercise of unchecked Taxing Power since 1936 have protected the traditional reserved powers of the states. Instead, they simply reference their earlier work. *See id.* at 1200 n.16 (citing Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010) (arguing that Article I authorizes Congress to tax, spend, and regulate to solve “collective action” problems created by interstate externalities and national markets, which states acting individually cannot effectively address)); Galle, *supra* note 253, at 411–12 (contending that federal taxation of health care increases state autonomy by addressing “free rider” problems). I have elsewhere explained why this approach cannot be reconciled with the Constitution’s basic Federalism Principle: that the federal government is limited to its enumerated powers and that all other powers are entrusted to the states. *See Pushaw, supra* note 94, at 1716–18, 1721–30, 1742–43, 1754.

276. *See supra* notes 207, 211–16, 224, 229–36, 245 and accompanying text.

impression that the two powers were inextricably linked and equally absolute. Therefore, it came as a surprise when all of the Justices (except Ginsburg and Sotomayor) concluded that the ACA had exceeded Congress's authority under the Spending Clause.²⁷⁷ A brief legal background will help to place this holding in context.

1. Spending Clause Doctrine

Congress can tax "to pay the Debts and provide for the common Defense and general Welfare of the United States."²⁷⁸ The "general Welfare" originally referred to the provision of "public goods" (i.e., those that must be made available to everyone, like roads), but did not include direct transfer payments from one group of citizens to another.²⁷⁹ The main historical debate was whether "general Welfare" encompassed only those subjects listed in Article I (Madison's view) or was a distinct grant of substantive power (Hamilton's position).²⁸⁰ In 1936, the Court adopted Hamilton's broad construction in *United States v. Butler*,²⁸¹ yet struck down the Agricultural Adjustment Act on the ground that it did not promote the general welfare but rather reached the "local" matter of agriculture, which the Tenth Amendment reserved to the states.²⁸²

The next year, in companion cases upholding the Social Security Act (SSA), the Court affirmed the Hamiltonian vision, but retreated from imposing federalism-based limits.²⁸³ The Court announced that Congress's discretionary determinations about how to provide for the general welfare in light of changing circumstances would be sustained unless "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment."²⁸⁴ The Court acknowledged that monetary "inducements" to the states might at some point rise to the level of unconstitutional "duress," but found that the SSA did not cross that line.²⁸⁵

Neither did any other federal law. Most significantly, the Court routinely upheld Congress's power to expressly condition states' receipt of funds on their compliance with federal directives—even in areas where Congress had no power to regulate directly, and the subject had

277. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–08 (2012) (Roberts, C.J.); accord *id.* at 2656–67 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

278. U.S. CONST. art. I, § 8, cl. 1.

279. See Epstein, *supra* note 17, at 30–32.

280. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5–6, 19–20, 27–31 (1994).

281. 297 U.S. 1 (1936).

282. *Id.* at 65–66, 74–75, 78.

283. See *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

284. *Helvering*, 301 U.S. at 640.

285. See *Steward*, 301 U.S. at 585–86, 590.

previously been entrusted to the states.²⁸⁶

In the leading case of *South Dakota v. Dole*,²⁸⁷ the Court sustained a statute that withheld five percent of states' federal highway funding if they did not raise their minimum drinking age to 21, even though the Twenty-first Amendment prohibits Congress from regulating alcohol.²⁸⁸ The Court concluded that this law met five requirements for Spending Clause legislation. First, Congress had acted for the "general welfare": providing a national solution to the interstate highway problems caused by states having different drinking ages.²⁸⁹ Second, the statute gave clear notice to the states that raising this age was a condition of receiving full federal highway funding, thereby ensuring that they voluntarily consented to the federal government's proposed contract terms.²⁹⁰ Third, and relatedly, Congress had "encouraged" rather than "coerced" states because five percent was a relatively small amount.²⁹¹ Fourth, Congress's conditions did not induce states to violate their citizens' constitutional rights.²⁹² Fifth, the condition (raising the drinking age) related to the federal interest in the spending program (promoting safe interstate highway travel).²⁹³

The *Dole* "limits," however, proved to be more rhetorical than real. Indeed, the Court rejected every challenge to Congress's exercise of its Spending Power—until *National Federation*.

2. The *National Federation* Opinions

Chief Justice Roberts, joined by Justices Breyer and Kagan and by

286. See *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143 (1947). In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), the Court acknowledged that Congress had power to fund state programs for the developmentally disabled. *Id.* at 15–16. Nonetheless, the Court held that, at the time Congress had first offered such funding, it had failed to unambiguously notify the states about a particular condition that it later tried to impose (requiring states to implement a "patients' bill of rights"). *Id.* at 17–25.

287. 483 U.S. 203 (1987).

288. *Id.* at 206–12.

289. *Id.* at 207–08.

290. See *id.* But see Epstein, *supra* note 104, at 954 (protesting that "[i]t hardly answers a [constitutional] challenge to congressional overreach for Congress to have made its illegal intention known clearly").

291. *Dole*, 483 U.S. at 211–12.

292. *Id.* at 208–11.

293. *Id.* at 207–09. But see Epstein, *supra* note 104, at 954 (observing that the issue should not have been whether Congress's condition related to its grant, but rather whether the federal government could help determine drinking ages); Lynn A. Baker & Mitchell N. Berman, *Getting off the Dole: Why the Court Should Abandon its Spending Doctrine, and How a Too-Clever Congress Could Provoke it to do so*, 78 IND. L.J. 459, 512–17, 522 (2003) (criticizing this "relatedness" factor as vague and capable of being applied with varying degrees of stringency).

the other four Republican Justices in their separate opinion, concluded that Congress had overstepped its boundaries under the Spending Clause by coercing states to adopt the Medicaid expansion (and all its conditions) through the threat of withholding *all* of their Medicaid funding (not merely the new money earmarked for Obamacare).²⁹⁴ The Court stressed that, because Medicaid spending consumed over twenty percent of the average state's budget and billions of dollars annually, states had no legitimate choice as to whether they would voluntarily accept federal funds and the attached conditions—unlike in cases such as *Dole*, which involved a small percentage and amount of funding.²⁹⁵ The Court acknowledged that Congress in the original Medicaid Act reserved the right to “alter” or “amend” its provisions.²⁹⁶ Nonetheless, the ACA made such a radical change—requiring states not merely to add a discrete category of covered individuals (such as the blind) but to care for millions of low-income people—that it was actually an entirely new program that the states could not possibly have anticipated.²⁹⁷

The Court warned that allowing Congress to compel the states to do its bidding would destroy state autonomy, threaten political accountability (because voters would not know whether to hold the federal or state governments responsible), and infringe upon individual liberty.²⁹⁸ To buttress this point, the Court invoked two cases from the 1990s holding that Congress could not “commandeer” state legislatures or executives to enact or implement laws.²⁹⁹

Justice Ginsburg (joined by Justice Sotomayor) disputed the majority's four main arguments.³⁰⁰ First, the Medicaid expansion was not a new program, but a mere addition to an existing statutory scheme set up to help the poor to obtain health care.³⁰¹ Second, when the states first agreed to cooperate with Medicaid, they were on notice that the

294. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2601–07 (2012) (Roberts, C.J.); *accord id.* at 2643, 2661–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

295. *Id.* at 2602–04 (Roberts, C.J.); *accord id.* at 2659–66 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

296. *Id.* at 2605–06 (Roberts, C.J.).

297. *Id.* at 2601–02, 2605–06 (Roberts, C.J.); *see also id.* at 2605 (describing the new ACA requirement as “a shift in kind, not merely degree”). The other four Republican Justices agreed. *See id.* at 2657, 2662–64 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

298. *Id.* at 2602 (Roberts, C.J.); *accord id.* at 2659–60, 2676–77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

299. *Id.* at 2602–03 (Roberts, C.J.) (citing *Printz v. United States*, 521 U.S. 898, 933 (1997); *New York v. United States*, 505 U.S. 144, 162 (1992)); *accord id.* at 2660 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (citing *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at 161–62, 168–69, 182–83).

300. *Id.* at 2629–42 (Ginsburg, J., concurring in part, dissenting in part).

301. *See id.* at 2630–32, 2635–36; *see also id.* at 2630–31, 2635 (noting that Congress had previously expanded Medicaid several times and imposed high costs on the states, whereas the federal government would pick up most of the tab for the ACA).

statute could be amended and that coverage might be increased.³⁰² Third, the ACA was not unduly coercive, but rather was a typical exercise of the Spending Power whereby states would receive funds if they complied with reasonable conditions set by Congress.³⁰³ Fourth, courts should treat “coercion” as a political question because it was impossible for them to determine whether states had a legitimate choice regarding funding.³⁰⁴

Indeed, Justice Ginsburg apparently believes that all of Congress’s judgments under the Spending Clause are not justiciable, because she failed to identify anything that might lie beyond this power. That candid embrace of unbridled federal authority probably explains why only one of her colleagues joined her opinion.

Turning to the remedy, Chief Justice Roberts allied with Justices Breyer and Kagan in ruling that Congress (1) could not withdraw *existing* funds from states that decline to comply with the ACA’s Medicaid expansion, but could offer *new* funds and condition their acceptance on the states’ voluntary compliance with the new ACA regulations; and (2) intended for the Court to preserve the rest of the ACA if one provision were deemed unconstitutional.³⁰⁵ Justices Ginsburg and Sotomayor agreed that Congress could offer the states new money to induce them to conform to the Medicaid expansion and that the invalidated provision could be severed from the rest of the statute.³⁰⁶ By contrast, the other four Justices would have struck down the entire ACA because the Medicaid expansion and the IM were so integral to the statute that it could not possibly work as Congress intended if either provision were invalidated.³⁰⁷

In sum, seven Justices concluded that Congress had run afoul of the Spending Clause by coercing the states.³⁰⁸ This rare supermajority consensus broke down, however, in the remedial stage.

302. *See id.* at 2630, 2636–39; *see also id.* at 2636–38 (arguing that precedent established that Congress must make its conditions clear at the time it offers the states funds, not when the original law creating a regulatory program was passed).

303. *See id.* at 2630, 2633, 2639–41; *see also id.* at 2634 (maintaining that, unlike in *Dole*, the ACA did not offer federal money to induce states to take action that Congress itself could not directly perform (raise the drinking age), because Congress obviously can regulate health care).

304. *See id.* at 2640–41.

305. *Id.* at 2607–08 (Roberts, C.J.). Unfortunately, Roberts’s decision to excise the ACA’s funding penalty from the Medicaid expansion freed states to refuse to participate, thereby undermining the statute’s purpose. *See* Magarian, *supra* note 26, at 32.

306. *Nat’l Fed’n*, 132 S. Ct. at 2630–31, 2641–42 (Ginsburg, J., concurring in part, dissenting in part).

307. *Id.* at 2667–77 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

308. *Id.* at 2601–08 (Roberts, C.J.); *accord id.* at 2643, 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

3. The Court's Long-Overdue Imposition of Limits Under the Spending Clause

For seventy-five years, judicial review of Spending Clause legislation had resulted in upholding every statute. In the real world, it would have made no difference if the Court had simply treated the Clause as raising political questions (as Justice Ginsburg suggested³⁰⁹). Thus, striking down an exercise of the Spending Power was a big departure from established practice, and is especially noteworthy because it garnered the votes of seven (not merely five) Justices.³¹⁰ Nonetheless, it is not clear whether *National Federation* is a once-a-century ruling or the beginning of a trend towards restraining Congress.³¹¹

If the latter, any serious attempt at imposing such limits would require the Court to set forth intelligible legal rules instead of the vague standards it provided.³¹² Most notably, the majority expressly refused to identify the dollar amount or percentage of federal funds that Congress would have to withhold to support a finding of “coercion” rather than mere “inducement.”³¹³ *Dole* allowed a five percent reduction amounting to a few million dollars, whereas *National Federation* rejected a denial of all federal funding to the tune of billions of dollars.³¹⁴ Most federal statutes fall between those extremes, and the Court will have to sort them out on a case-by-case basis by making increasingly fine distinctions that have little legal or logical basis.³¹⁵

309. See *id.* at 2640–41 (Ginsburg, J., concurring in part, dissenting in part).

310. See Reynolds & Denning, *supra* note 27, at 829.

311. See, e.g., Dorf, *supra* note 137, at 901 (predicting that the case will merely set “an extreme outer limit” on the Spending Power, and will not begin a serious rollback); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 864–67, 870–71, 898, 910 (2013) (contending that *National Federation* will be read narrowly as finding unconstitutional “coercion” only when a spending condition (1) involves large amounts of federal money, (2) changes the terms of participating in entrenched cooperative programs, and (3) prevents states from continuing in such schemes unless they also agree to participate in a separate and independent program).

312. See Epstein, *supra* note 104, at 954 (decrying the “mushy factors” used in Spending Power analysis).

313. *Nat'l Fed'n*, 132 S. Ct. at 2606 (Roberts, C.J.) (declaring that the Court need not “fix a line” where congressional persuasion actually turns into compulsion); see also Bagenstos, *supra* note 311, at 901 (highlighting the “line-drawing problem of identifying just when an offer of funds became large enough to become coercive”); Baker & Berman, *supra* note 293, at 485, 518–21, 532–33 (faulting the Court for failing to identify an objective basis for determining when the pressure of any given federal offer becomes so great as to amount to “coercion”).

314. See *supra* notes 294–95 and accompanying text.

315. See Magarian, *supra* note 26, at 29–30 (emphasizing that the Court's refusal to define “coercion” left Congress and lower federal courts with no guidance in determining the constitutionality of spending conditions). “Coercion is notoriously difficult to identify, in large part because no agreement exists on the proper baseline against which to assess if a state

Moreover, the Court conflated “coercion” under the Spending Clause with Congress’s “commandeering” of states—i.e., directly ordering them to enact or execute laws, with no funding incentives.³¹⁶ Although both “coercion” and “commandeering” threaten state autonomy, the latter seems uniquely destructive of federalism because Congress simply orders states to obey its commands.³¹⁷ Furthermore, the Court’s point that “coercion” undermines political accountability, while correct, cannot be reconciled with its ruling that permits Congress to evade political responsibility for increasing taxes by deeming an exaction a regulatory “penalty” and trusting the Court to uphold it later as a “tax.”³¹⁸

Indefiniteness also characterizes two other aspects of the *National Federation* decision. First, the Court neglected to explain how it could tell when a purported statutory “amendment” was so significant as to be, in reality, a new law.³¹⁹ In any event, if Congress has power under the Spending Clause, it should not matter constitutionally whether that power is exercised through amending an existing statute or enacting a new one.³²⁰ Second, it seems inherently subjective to try to determine whether Congress’s notice to states in its original legislation of its prerogative to make amendments (as in the 1965 Medicaid law) will sufficiently enable states to anticipate future changes in coverage.³²¹

In short, the Court has failed to provide concrete guidance to Congress or judges. Instead, they must make *ad hoc* gut calls as to whether a statutory provision (1) “induces” or “coerces” the states, (2) is a mere “amendment” or a new program, or (3) could have been

funding condition goes too far.” Metzger, *supra* note 24, at 99.

316. See *Nat’l Fed’n*, 132 S. Ct. at 2602–03 (Roberts, C.J.); *id.* at 2660 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

317. Cf. Epstein, *supra* note 104, at 955 (recognizing the formal distinction between Congress’s direct “commandeering” of states and its conditional use of the Spending Power, but arguing that in both instances the federalism concerns are the same). See generally Lynn A. Baker, *Constitutional Ambiguities and Originalism: Lessons from the Spending Power*, 103 Nw. U. L. REV. 495, 519–42 (2009) (demonstrating that the Court’s pre-*National Federation* approval of plenary Spending Power resulted in systematic wealth redistribution from large-population states to smaller ones, thereby infringing on the autonomy of the more populous states).

318. See *supra* notes 229–48, 273–74 and accompanying text.

319. See *Nat’l Fed’n*, 132 S. Ct. at 2635–36 (Ginsburg, J., concurring in part, dissenting in part).

320. See *id.* at 2629, 2636; see also Magarian, *supra* note 26, at 28 (arguing that the bifurcation between the “existing” and “new” Medicaid programs had “no basis in law or logic”); Metzger, *supra* note 24, at 96 (questioning any “firm distinction between the old and new Medicaid and between inducement and coercion”).

321. See *Nat’l Fed’n*, 132 S. Ct. at 2637–39 (Ginsburg, J., concurring in part, dissenting in part); Bagenstos, *supra* note 311, at 903.

foreseen by the states.³²² Such elastic standards under the Spending Clause (as under the Commerce Clause) create discretion so broad that political and ideological factors will heavily influence legal judgment. Therefore, the Court should make a more fundamental change by adopting a rules-based approach.

Ideally, the Court would abandon “coercion” as its analytical touchstone because Congress’s conditional grants to states are almost always coercive. The reason is that no rational elected official will decline her state’s fair share of federal taxpayer-provided funds, then make up the difference by increasing state taxes to get exactly the same benefit.³²³ Because such double taxation is political suicide, states will invariably follow Congress’s wishes. Thus, the issue is always the degree of coercion, not the false dichotomy between “encouragement” and “coercion.”

Realistically, however, the Court is unlikely to abandon a test it has followed for nearly eight decades. Accordingly, a second-best solution would be to set forth precise numerical amounts, in terms of both percentage and dollars of funds withheld, that Congress cannot exceed without being found to have “coerced” the states.³²⁴

Finally, Congress should never be permitted to invoke the Spending Clause to achieve indirectly what it lacks Article I power to do directly. That is especially true when, as in *Dole*, a specific constitutional provision prohibits the federal government from interfering with state control of a subject.³²⁵

National Federation, then, warrants cautious optimism. On the one

322. See Metzger, *supra* note 24, at 99–102, 115–16 (proposing as an alternative serious judicial review of administrative determinations that state funds should be terminated, including reversal of decisions that do not sufficiently consider federalism concerns).

323. See Epstein, *supra* note 104, at 956. Of course, a state might simply forgo the proffered federal benefit (and attached funds) and conclude that the benefit is not worth the cost of imposing a state tax.

324. Professor Berman has rejected the idea of basing unconstitutionality on the amount of funds states stand to lose. Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1286, 1295–96 (2013). Instead, he contends that the Court, in *National Federation* and other decisions, has incorrectly assumed that “coercion” means compulsion—i.e., that states had no rational choice but to accept Congress’s conditions. *Id.* at 1285, 1287, 1289–303, 1346. Berman would define “coercion” more precisely to refer to a situation in which Congress threatens to withhold a benefit for the bad purpose of penalizing states for exercising their constitutional right to decline the offer of federal funds. *Id.* at 1286–88, 1308–14, 1343, 1347. Under this framework, the Medicaid expansion was coercive because it penalized states for asserting their constitutional prerogative to refuse federal money. *Id.* at 1280, 1315–40, 1347. Although Professor Berman and I set forth different proposals, we agree that the Court’s current “coercion” standard must be given more concrete content.

325. See *South Dakota v. Dole*, 483 U.S. 203, 212 (1987) (Brennan, J., dissenting).

hand, the Court has finally enforced limits on the Spending Clause.³²⁶ On the other hand, no one quite knows what those restrictions are. The Court will try to work out such details in future cases, but such a common law approach has failed in many other areas of constitutional law.³²⁷

II. THE JURISPRUDENTIAL IMPLICATIONS OF *NATIONAL FEDERATION*

National Federation contains the most substantial rethinking of Congress's powers since the New Deal, and the decision could have a profound impact. Whether it is actually a harbinger of such change, however, depends primarily on whether Republican Justices remain in the majority.³²⁸ If they do, constitutional jurisprudence might well be transformed in three key areas.

First, the Court for the first time since 1936 held that a major federal statute had exceeded Congress's power to regulate interstate commerce: The ACA illegitimately imposed a purchase mandate on individuals who were not currently engaged in commercial "activity."³²⁹ *National Federation* might presage further restrictions on the Commerce Clause.

Second, the five conservatives held that, even if Congress had concluded that a specific means (such as the IM) was "necessary" to implement its legislative program, such a mechanism was not "proper" if it undermined the Constitution's structure of federalism.³³⁰ This rejection of a statutory provision as "improper," however, departed from the Court's longstanding tradition of accepting Congress's discretionary choice of any means that were reasonably related to achieving an Article I end (an easy test that virtually all statutes met).³³¹ Such deference extended to Congress's judgments about federalism.³³²

326. See Metzger, *supra* note 24, at 86 (suggesting that Chief Justice Roberts's endorsement of Congress's broad power to tax led him to constrain the Spending Clause, because otherwise the federal government's huge financial resources would effectively grant it unbridled authority).

327. See Pushaw, *supra* note 34, at 520–29, 577–91 (providing numerous illustrations of such failures).

328. See Barnett, *No Small Feat*, *supra* note 16, at 1341 ("Of course a change in the Justices could negate the importance of the [*National Federation*] decision, but that could happen with any doctrine.").

329. See *supra* Subsection I.A.2.

330. See *supra* notes 79–81 and accompanying text.

331. See *supra* notes 90–92, 119–21, 127–29 and accompanying text.

332. To take the most famous example, the Marshall Court upheld the Bank of the United States as a necessary and proper means of implementing various Article I powers (e.g., taxation, borrowing, and regulating commerce), even though states (echoing Madison and Jefferson) protested that doing so destroyed the Constitution's federal–state balance. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406–15 (1819), discussed *supra* notes 119–121 and accompanying text.

Because the Court's basic "substantial effects" test depends upon the Necessary and Proper Clause,³³³ *National Federation* may portend similarly aggressive judicial review of other federal regulatory laws.

Third, the Court abruptly reversed seventy-five years of practice by invalidating Spending Clause legislation.³³⁴ This ruling might trigger considerable litigation which previously would have seemed quixotic.

Again, however, none of these potentially radical changes will occur if one Republican Justice is replaced by a Democrat. Indeed, even if the current majority remains intact, *National Federation* may not have much lasting force.³³⁵ The main reason is that the ACA is the only federal statute ever passed pursuant to the Commerce Clause that imposed an individual mandate to buy certain products.³³⁶ Congress may never employ this device again, which would make *National Federation* a one-shot curiosity.³³⁷ Moreover, the Court will probably prove reluctant to second-guess Congress's determinations about whether a law is "necessary and proper" to achieve a desired legislative goal, as such judgments are usually subjective and policy-laden.³³⁸ It is also worth emphasizing that Obamacare presented an extreme situation under the Spending Power where Congress threatened non-complying states with a cutoff of *all* federal money running into billions of dollars.³³⁹ Less draconian reductions in funding will likely prompt correspondingly more deferential judicial review.

Of course, the biggest doubts about the Court's willingness to restrain Congress arise because Chief Justice Roberts joined the liberal Justices in refusing to curb the Taxing Power, which had the practical effect of negating the limiting constructions that he and his fellow Republicans had placed on the Commerce and Necessary and Proper Clauses.³⁴⁰ Congress apparently can now pass any law it wishes and

333. See *supra* notes 41–51, 89–90, 118–21 and accompanying text.

334. See *supra* Section I.C.

335. See Metzger, *supra* note 24, at 113 (predicting that the case "will not be a foretaste of a newly retrenched federal government, but instead at most a crimping at the edges").

336. See *supra* notes 7, 71–76, 95–99, 107–09, 135, 160 and accompanying text.

337. Randy Barnett recognizes, but downplays, this argument. See Barnett, *No Small Feat*, *supra* note 16, at 1342. Practically speaking, however, the prevalence of a particular type of statutory provision is quite relevant in gauging the impact of a case that interprets such a provision.

338. See *supra* notes 90–91, 120–21, 127–29 and accompanying text.

339. See *supra* text accompanying notes 294–95, 314.

340. See *supra* notes 17, 137–38 and accompanying text. Professor Barnett rejects this contention on the ground that Roberts did recognize a limit on the Taxing Power—that it could not be exercised to coerce rather than incentivize—which will be enforced in future cases. Barnett, *No Small Feat*, *supra* note 16, at 1337–40. This faith in the Chief Justice's willingness to invalidate a federal tax law seems misplaced, however, as he could easily have done so in *National Federation* but instead chose to save the IM through creative statutory and constitutional interpretation. See *supra* Subsection I.B.2.a.

trust the Court to uphold it as a valid tax.³⁴¹ Therefore, the only remaining restraint is that the money raised by taxes cannot be spent in a way that “coerces” states, but the Court may not be inclined to stretch its *National Federation* “coercion” holding beyond the unique facts of that case.³⁴²

Most importantly from a jurisprudential standpoint, the Court’s reaffirmation of seemingly absolute federal taxing authority cannot be squared with its repeated endorsement of the Federalism Principle: the classic idea that the Constitution limits the federal government to its enumerated powers and reserves all others to the states or “the People” collectively.³⁴³ To be fair, Justices Scalia, Kennedy, Thomas, and Alito were perfectly consistent: They argued that the Federalism Principle demanded that the ACA be struck down because it went beyond Congress’s powers under the Commerce, Necessary and Proper, Taxing, and Spending Clauses—and concomitantly invaded the states’ reserved power.³⁴⁴ Conversely, Justice Ginsburg showed equal and opposite consistency: She championed a nationalistic vision of federalism, urging judicial deference to Congress’s resolution of any problem that it deems to be of national interest and beyond the capacity of states to address.³⁴⁵ By contrast, Chief Justice Roberts’s opinion presented a schizophrenic view.

On the one hand, he rhetorically agreed with his fellow Republican Justices’ embrace of the traditional Federalism Principle. For example, the Chief Justice began by laying out the historical consensus that the Constitution’s design—committing all powers to the states except for those specifically granted to the federal government—promoted accountability and preserved individual liberty.³⁴⁶ He also declared that the Court’s “respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed.”³⁴⁷ Discharging this duty to exercise serious judicial review to protect federalism, Chief Justice Roberts relied heavily upon the Founders’ understanding in rejecting Congress’s

341. See *supra* notes 246–48, 255 and accompanying text.

342. See *supra* notes 11, 294–99, 311 and accompanying text; see also John Yoo, *Chief Justice Roberts and his Apologists*, WALL ST. J. (June 29, 2012), <http://online.wsj.com/news/articles/SB10001424052702303561504577496520011395292> (arguing that the Court will likely sustain less extreme exercises of the Spending Power, and that any limits imposed under the Commerce and Spending Clauses were undercut by the Court’s expansive reading of the Taxing Power).

343. See *supra* notes 14–20 and accompanying text.

344. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2642–77 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

345. *Id.* at 2609–12, 2614–15 (Ginsburg, J., concurring in part, dissenting in part).

346. *Id.* at 2577–78 (Roberts, C.J.).

347. *Id.* at 2579.

attempts to (1) impose the IM as a regulation of interstate commerce,³⁴⁸ (2) invoke the Necessary and Proper Clause as an end-run to achieve the same result,³⁴⁹ and (3) use the Spending Power to coerce the states.³⁵⁰

On the other hand, the Chief Justice did not mention limited and enumerated federal powers or federalism in upholding the IM under the Taxing Clause.³⁵¹ This silence speaks volumes. Every time the Court permits Congress to assume control over subjects formerly entrusted to the states, the Tenth Amendment and its underlying values are eroded. For purposes of the Federalism Principle, the only relevant fact is that power has been transferred from the states to the federal government; it does not matter *which* Article I power effectuates this shift. Likewise, the political reality is that Congress and the President (and the American people) cared only that Obamacare was sustained; only lawyers and scholars worried about the details.

But those details are the *raison d'être* of the Justices, who have a duty to provide legally cogent rationales for their decisions. Unfortunately, Chief Justice Roberts failed to coherently explain how constitutional federalism would be preserved by restricting Congress under the Commerce, Necessary and Proper, and Spending Clauses, yet allowing Congress to reach its desired result under the Taxing Power.³⁵² Instead of invalidating the ACA and invigorating the Federalism

348. *Id.* at 2586–87 (contending that the Framers’ use of “regulate” in the Commerce Clause presupposed existing commercial activity); *id.* at 2589 (quoting Madison’s statements that all federal government powers, including the Commerce Clause, had limits).

349. *Id.* at 2591–92 (citing Madison, Hamilton, and Marshall to justify imposing restrictions on Congress’s authority under the Necessary and Proper Clause).

350. *Id.* at 2602–03, 2608 (asserting that the Founders did not intend for Spending Clause legislation to undermine state autonomy or individual liberty). Overall, Chief Justice Roberts and his four Republican colleagues kept alive the idea of judicially enforced federalism in their discussions of the Commerce, Necessary and Proper, and Spending Clauses. Compare Reynolds & Denning, *supra* note 27, at 828–31 (applauding this preservation), with Magarian, *supra* note 26, at 32 (decrying the conservative Justices for activism in imposing new federalism-based restrictions on federal power).

351. His only nod to early history was quoting Benjamin Franklin’s quip that nothing is certain “except death and taxes.” *Nat’l Fed’n*, 132 S. Ct. at 2599. Professor Karlan notes that Roberts’s worries that Congress might abuse its powers, which pervaded his Commerce Clause analysis, disappeared when he turned to the tax issue, probably because he believed that the political process would prevent confiscatory taxation. See Karlan, *supra* note 23, at 50–51.

352. See Reynolds & Denning, *supra* note 27, at 814–15 (stressing that Roberts’s broad reading of the Taxing Clause eroded the principle of limited government). Professor Barnett acknowledges the possibility that the Court will always uphold a major federal statute by any means necessary, as Chief Justice Roberts’s opinion illustrates. Barnett, *No Small Feat*, *supra* note 16, at 1341. Nonetheless, he believes that the federalism-based doctrinal limitations articulated in *National Federation* will have practical future relevance. *Id.* at 1332–37, 1341–43, 1349–50. But if the Court could not even logically apply these federalism restrictions *in the very case in which they were announced* by striking down the IM, there is no reason to suppose that a majority of Justices will do so in the future.

Principle, the Chief Justice hammered another nail in its coffin. The Constitution's original federalist design suffered a near-fatal blow in 1937, when the Court discarded this structure (and its related protection of economic rights) and substituted the idea that only a centralized, Parliament-style government could effectively regulate the economy and social welfare.³⁵³ The Court then ignored the Federalism Principle for decades in approving massive federal regulation in areas like crime, poverty programs, and the environment.³⁵⁴ The Rehnquist Court took a few baby steps toward imposing some outer limits on Congress in *Lopez*, *Morrison*, and the "commandeering" cases, but even those slight gains appeared to recede in *Raich*.³⁵⁵

The upshot is that the Court in *National Federation* wasted a once-in-a-generation opportunity to render a landmark decision that would have given new life to the Federalism Principle.³⁵⁶ Instead, the Court sent out mixed signals that increased uncertainty about the scope of Congress's powers.³⁵⁷

III. NATIONAL FEDERATION'S EFFECT ON THE REPUTATION OF CHIEF JUSTICE ROBERTS AND HIS COURT

Why did Chief Justice Roberts switch sides at the eleventh hour to uphold the ACA?³⁵⁸ How Americans answer that question will affect the reputation of both Roberts and the Court. Commentators have suggested a range of possibilities.

The most disturbing is that the Chief Justice succumbed to public pressure from President Obama and his allies in Congress, the media, and academia—all of whom had been darkly warning the five Republican Justices not to reach the seemingly partisan result of striking

353. See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 399, 455–57 (1996) (describing this seismic shift).

354. See Nelson & Pushaw, *supra* note 38, at 83–88 (citing cases).

355. See *supra* notes 52–69 and accompanying text.

356. See Metzger, *supra* note 24, at 87 (arguing that *National Federation*'s net result might be "a change in the *form* of federal measures, but little restriction on the *scope* of federal power" (emphasis added)).

357. Professor Karlan claims that the conservative majority seeks to reverse or limit core Warren Court cases upholding Great Society and civil rights legislation. See Karlan, *supra* note 23, at 11. But the Burger, Rehnquist, and Roberts Courts have routinely applied these decisions (such as *Katzenbach* and *Heart of Atlanta Motel*) without ever questioning them. See *supra* notes 50–51 and accompanying text. Indeed, since 1937 exactly zero Commerce, Taxing, and Spending Clause cases have been overruled.

Thus, I agree with Randy Barnett that the five conservative Republican Justices have likely adopted a compromise approach by accepting the New Deal and Warren Court precedent as a *fait accompli*, but insisting that Congress justify the assertion of any new powers with a constitutional theory that does not destroy the enumerated powers scheme and federalism. See Barnett, *No Small Feat*, *supra* note 16, at 1348–50.

358. See *supra* notes 21–27 and accompanying text.

down a Democratic President's signature legislation in an election year.³⁵⁹ That accusation can never be proven, and it is inconsistent with Chief Justice Roberts's refusal to bend in other politically charged constitutional cases.³⁶⁰ Nonetheless, the Democrats' concerted effort to sway the Justices—and the popular perception that this strategy worked—have damaged the Court's credibility.³⁶¹

A more flattering scenario is that the Chief Justice acted in a statesmanlike way to preserve the Court's stature as an institution ruled by law, since citizens would recognize that the result did not reflect his conservative political views and hence must have been based on constitutional principles.³⁶² A related idea is that Americans would see deference to Congress and the President as an appropriate exercise of judicial restraint that would leave the ultimate fate of Obamacare to the democratic process established in the Constitution.³⁶³ Alas, the belief that the Court could have remained above the political fray was misguided, as most Americans concluded that politics played a major role in the *National Federation* decision.³⁶⁴ Relatedly, any attempt by Chief Justice Roberts to avoid the appearance of a politicized decision backfired when his vote switch became public.³⁶⁵

Indeed, even some scholars who supported the result in *National Federation* conceded that, in light of the obvious weaknesses of Chief Justice Roberts's legal analysis, he must have been driven primarily by a desire to protect the Court as an institution.³⁶⁶ But nakedly striving to

359. See *supra* note 23 and accompanying text.

360. See, e.g., *Citizens United v. Fed. Election Comm'n*, 588 U.S. 310 (2010) (ruling that the First Amendment prohibits the federal government from restricting political contributions by corporations and unions). President Obama publicly urged the Court to sustain the campaign finance reform law and lambasted *Citizens United* in his January 2010 State of the Union address, and he has continued to chastise Republicans on this issue. See Jackie Calmes & Carl Hulse, *Obama Assails Republicans on Campaign Finance*, N.Y. TIMES (July 26, 2010), <http://www.nytimes.com/2010/07/27/us/politics/27obama.html>.

361. See, e.g., Reynolds and Denning, *supra* note 27, at 818–23; see also Lydia Saad, *Americans Issue Split Decision on Healthcare Ruling*, GALLUP (June 29, 2012), <http://www.gallup.com/poll/155447/Americans-Issue-Split-Decision-Healthcare-Ruling.aspx> (noting that “[n]early two-thirds of Americans see politics as having a heavy hand in the ruling”).

362. See *supra* note 24 and accompanying text.

363. *Id.*

364. See Saad, *supra* note 361.

365. See Eastman, *supra* note 22, at 21; Reynolds & Denning, *supra* note 27, at 818–23; Magarian, *supra* note 26, at 35 (emphasizing that the leak of Roberts's switch came from inside the Court and that “[n]o capable defender of the Court's institutional reputation would foster such mayhem”).

366. See, e.g., Magarian, *supra* note 26, at 31–35. Professor Magarian criticized the Chief Justice for “failing to provide sufficient legal justifications for any of his [three] major conclusions while violating traditional norms of judicial review.” *Id.* at 16. First, Roberts's discussion of the Commerce and Necessary and Proper Clauses was unnecessary and hence an advisory opinion. *Id.* at 17–22. Second, he did not coherently explain his rulings that (1)

achieve political and institutional aims hardly seems like the kind of judicial modesty that will burnish the Court's reputation as a nonpartisan body governed by law.³⁶⁷

Finally, some observers have portrayed Roberts as a legal/political genius in the mold of Chief Justice John Marshall.³⁶⁸ Most pertinently, in *Marbury v. Madison*,³⁶⁹ Marshall achieved his essential long-range goal of proclaiming the judiciary's power to invalidate unconstitutional acts by political officials, yet avoided a direct clash with the hostile Jefferson Administration by declining to exercise jurisdiction and thus not ordering Secretary of State Madison to do anything.³⁷⁰ In like fashion, Chief Justice Roberts supposedly handed liberal Democrats an immediate victory in *National Federation*, but advanced Republican interests in the long run by (1) restricting Congress's powers under the Commerce, Necessary and Proper, and Spending Clauses,³⁷¹ and (2) shielding himself from accusations of partisanship if he later reaches conservative results in cases addressing topics like affirmative action and same-sex marriage.³⁷² The analogy to Marshall, however, collapses under closer inspection.

To begin with, Marshall and his fellow Federalist Justices faced impeachment if they defied the Jefferson Administration,³⁷³ whereas Chief Justice Roberts and his Republican colleagues were hardly in such dire straits. On the contrary, there was no political imperative to sustain the ACA.³⁷⁴ In fact, polls have consistently shown that most Americans oppose Obamacare because they think it will decrease the

Congress in the ACA implicitly waived the AIA's prohibition against premature challenges to tax laws, or (2) the IM was a "tax" rather than a "penalty" for constitutional purposes. *Id.* at 22–26. Third, his Spending Clause analysis hinged on the conclusory assertions that Congress had "coerced" the states and had enacted a "new" Medicaid program. *Id.* at 34–35.

367. See *id.* at 33 (contending that legally principled Justices should ignore political considerations—both actual partisanship and the possibility that they will be perceived as partisan—because it is impossible to determine when it is appropriate to vote against one's legal convictions to counteract public perceptions of the Court's political divisions).

368. See, e.g., Tribe, *supra* note 25; Steven M. Feldman, *Chief Justice Roberts's Marbury Moment*, 13 WYO. L. REV. 335 (2013); Jeffrey Rosen, *John Roberts*, ATLANTIC (Oct. 24, 2012, 10:41 PM), <http://www.theatlantic.com/magazine/archive/2012/11/john-roberts/309131/>; R. Emmett Tyrrell, Jr., *Roberts' Foxy Rule*, WASH. TIMES (July 4, 2012), <http://www.washingtontimes.com/news/2012/jul/4/roberts-foxy-rule/>.

369. 5 U.S. (1 Cranch) 137 (1803).

370. See *id.* at 154–80; see also Pushaw, *supra* note 353, at 444–50 (describing Marshall's political and legal maneuvering in *Marbury*).

371. See, e.g., Tyrrell, *supra* note 368; see also *supra* note 25 and accompanying text.

372. See *supra* note 26 and accompanying text.

373. See James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 260 n.141 (1992).

374. See Reynolds & Denning, *supra* note 27, at 809–11 (rejecting the *Marbury* analogy on the grounds that (1) President Obama almost certainly would have obeyed a Court judgment invalidating the ACA, and (2) the public would have accepted such a ruling as legitimate and indeed welcome, given Obamacare's unpopularity).

quality of health care and greatly increase costs.³⁷⁵

Moreover, unlike Marshall, Chief Justice Roberts is highly unlikely to see his short-term sacrifice yield his desired long-lasting gains. Initially, it is curious that Roberts would “keep his powder dry” for more important future cases, because *National Federation* will likely prove to be the most consequential decision of his tenure, given its extensive analysis of constitutional power in the context of the most sweeping and costly federal legislation since the 1960s. Put differently, it makes little strategic sense for the Court to announce limits under certain Article I clauses to be applied in later litigation (perhaps involving trivial statutes akin to the Gun-Free School Zones Act), while refusing to halt Congress’s constitutional overreaching in a landmark case before it.³⁷⁶ Furthermore, Roberts’s approach unwisely assumes that the liberal Justices will respect the *National Federation* precedent. If a Democratic Justice replaces a Republican one, however, the bare majority’s holdings under the Commerce and Necessary and Proper Clauses will likely be swept away,³⁷⁷ and the Spending Clause ruling will probably be confined to the peculiar factual situation of a total funding cutoff.³⁷⁸ Finally, the Chief Justice would be naive to hope that the liberal politicians and commentators who are now lauding him will pull their punches later if he joins conservative decisions on hot-button constitutional issues like same-sex marriage.

The comparison between Chief Justices Roberts and Marshall breaks down further when one recognizes that Marshall led a unanimous Court in *Marbury* and other key cases,³⁷⁹ whereas Roberts wrote a legally

375. See, e.g., Jeffrey M. Jones, *Americans Divided on Repeal of 2010 Healthcare Law*, GALLUP (Feb. 27, 2012), <http://www.gallup.com/poll/152969/Americans-Divided-Repeal-2010-Healthcare-Law.aspx> (documenting this position and adding that 72% of Americans believe that the IM is unconstitutional); Frank Newport, *Americans See More Economic Harm Than Good in Health Law*, GALLUP (July 5, 2012), <http://www.gallup.com/poll/155513/Americans-Economic-Harm-Good-Health-Law.aspx>.

Furthermore, the severe economic downturn makes adding such an expensive entitlement very risky, as evidenced by the recent fiscal implosion of many European nations under the weight of unsustainable social welfare schemes (including government-controlled medical care). See Max Boot, *ObamaCare and American Power*, WALL ST. J. (Mar. 25, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052748703312504575141744210163602.html>.

376. See Shapiro, *supra* note 229, at 22–23 (arguing that it made no sense for Roberts to “save the Court” as a legal institution entrusted with making hard constitutional decisions by rendering an opinion widely viewed as political in an epochal case).

377. See *supra* notes 34, 123–24 and accompanying text.

378. See *supra* text accompanying notes 294–97; see also Yoo, *supra* note 342 (contending that a liberal Court majority would discard the *National Federation* limits under the Commerce and Spending Clauses, in which case Roberts will not reap the long-term gains that Marshall did in *Marbury* by permanently establishing judicial review).

379. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 10, 16 (1996).

unpersuasive opinion that no other Justice joined in full—telling evidence of his inability to lead the Court.³⁸⁰ And his fellow Republicans' barely concealed anger³⁸¹ suggests that they will be less inclined to cut him slack in the future.

Finally, John Marshall was a skilled politician who had served in Congress and as Secretary of State,³⁸² while John Roberts had no similar high-profile political experience but rather made his name as a top-notch appellate lawyer.³⁸³ And therein might lie the true explanation for Roberts's switch. Appellate advocates appearing before the Supreme Court strive to piece together at least five votes, usually by crafting a middle-of-the-road position that features hyper-technical legal analysis of sources that are often inconsistent or conflicting (as in most constitutional areas).³⁸⁴ Such attorneys focus solely on winning the case, even if doing so requires making questionable or hairsplitting arguments—or perhaps convincing oneself that they are actually sound.³⁸⁵ Thus, Roberts may have come to believe that (1) the Commerce Clause allows Congress to regulate “activity” but not “inactivity;” (2) the IM “penalty” was not a “tax” under the AIA, but somehow became one for constitutional purposes; and (3) under the Spending Clause, it was possible to distinguish “coercion” from “inducement” and “existing” Medicaid from the “new” ACA program.³⁸⁶ It hardly impugns John Roberts's integrity to suggest that, in *National Federation*, he was acting as a skilled appellate litigator. After all, that's what he is.

And Roberts is not unique. For the first time in history, the Court has no Justices with electoral experience, but rather consists of lawyers who served as federal appellate judges (except for Elena Kagan, but even she handled appeals as Solicitor General).³⁸⁷ Not surprisingly, their opinions tend to treat the Constitution as a purely legal document and downplay its status as a political charter.³⁸⁸ Relatedly, the Justices often get bogged down in arcane disputes over the meaning of language in prior

380. See Magarian, *supra* note 26, at 34–35 (maintaining that the Chief Justice's failure to convince any of his colleagues to join his opinion (or to reinforce it in their separate opinions) reflects poorly on his legal reasoning and leadership abilities).

381. See *supra* note 22 and accompanying text.

382. See HOBSON, *supra* note 379, at 1–8.

383. See *supra* note 28 and accompanying text.

384. See *supra* notes 29–32 and accompanying text.

385. See *supra* note 31 and accompanying text.

386. See *supra* Subsections I.A.2., B.2.a., C.2. Consequently, the Chief Justice's vote switch on the taxing issue could have reflected a genuine change of heart and mind.

387. See Karlan, *supra* note 23, at 67.

388. See *id.* at 66–71 (making this point, and adding that the Justices' lack of electoral experience and their abuse by Senators at confirmation hearings often lead them to show disdain for the political process and the constitutional judgments of elected officials).

cases that prevent them from reaching agreement on broader constitutional principles.³⁸⁹

Ironically, then, the Court is composed exclusively of technically proficient attorneys without relevant political experience at a time when constitutional decision-making is widely regarded as politicized. Several high-profile cases, particularly *Bush v. Gore*,³⁹⁰ have increasingly led the public to see the Court not as an impartial arbiter of justice under the law, but merely as another political institution.³⁹¹ That perception has been reinforced by the degeneration of the confirmation process, which now focuses on the results a nominee is likely to reach on politically charged subjects like abortion, not on her legal credentials and judicial philosophy.³⁹² In this partisan environment, Presidents have correctly deduced that prominent politicians with well-known positions on such issues have less chance of being confirmed than federal appellate judges and lawyers, who can assure the Senate that they have simply followed the law laid down by the Supreme Court.³⁹³

National Federation illustrates these problems. The Chief Justice managed to cobble together five votes for each of his legal positions, but only at the cost of writing a disjointed opinion that, taken as a whole, was so unpersuasive and politically tone-deaf that none of his

389. The most pertinent example is the Justices' bitter argument over the meaning of the word "activity" as used in previous Commerce Clause cases. *See supra* notes 73–78, 82–91 and accompanying text.

390. 531 U.S. 98 (2000) (per curiam) (ruling that the Equal Protection Clause required uniform standards in recounting ballots after a presidential election deadlock, and therefore reversing a Florida court's order allowing state election officials to apply a subjective "intent of the voter" test, which effectively ensured George W. Bush's election). This politically fraught holding had little basis in the Constitution's text, structure, and history, which indicated that such electoral matters should be left initially to the states and ultimately to the United States Congress. For a detailed explanation of this conclusion, see Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359, 360–61, 382–402 (2001); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 605, 611–23 (2001).

391. *See* Pushaw, *supra* note 34, at 520–29, 577–91 (highlighting the dangers of the Court's politicization of constitutional law).

392. *See id.* at 584–85, 588; Karlan, *supra* note 23, at 66 (lamenting the "highly partisan, consciously ideological [confirmation] process").

393. Most famously, at his confirmation hearing John Roberts depicted the Justices as umpires who call "balls and strikes," thereby implying that cases have clear-cut answers. Roberts: 'My Job Is to Call Balls and Strikes and Not to Pitch or Bat,' CNN (Sept. 12, 2005, 4:58 PM), <http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>. Similarly, Elena Kagan proclaimed that at the Supreme Court, "it's law all the way down." Paul Kane, *Kagan Sidesteps Empathy Question, Says 'It's Law All the Way Down'*, WASH. POST (June 29, 2010 4:48 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/29/AR2010062903935.html>.

colleagues joined him in full.³⁹⁴ Moreover, his *sub rosa* political calculations look short-sighted and naive, and they have tarnished his reputation.³⁹⁵ Unfortunately, Roberts was in a no-win situation, as he would also have been criticized for political manipulation if he had come out the other way.

In short, most Americans believe, with justification, that politics heavily influences constitutional law. Given that reality, the Court's leader should be a seasoned politician who is adept at forging consensus to achieve core goals—like, say, John Marshall or Earl Warren. Widely acknowledged as our two most influential Chief Justices, they understood the uniqueness of their legal/political perch atop the Third Branch of Government.³⁹⁶ Marshall and Warren each had a broad and unified constitutional vision, which they advanced in every one of their opinions.³⁹⁷ Most critically, they exhibited the personal and political leadership necessary to convince their colleagues to join them, as shown by their unanimous opinions in watershed cases such as *McCulloch v. Maryland*³⁹⁸ and *Brown v. Board of Education*.³⁹⁹

By contrast, John Roberts has been a shrewd legal technician who carefully patches together compromise constitutional opinions with no overarching theme. Perhaps that is the best we can hope for in our polarized political landscape, but it is not the stuff of greatness in a Chief Justice. Indeed, like his predecessor William Rehnquist, Chief Justice Roberts has been unable to unify the Court as an institution.

On the contrary, it tends to fracture badly in all constitutional cases, not merely those involving congressional power like *National Federation*, *Lopez*, and *Morrison*. For example, the Justices split along the usual political lines (except for Kennedy) in determining the extent of the President's Article II power to wage the War on Terrorism and the countervailing constitutional rights of alleged enemy combatants.⁴⁰⁰

394. See *supra* notes 7–12, 22, 29–32, 340, 352, 366, 380 and accompanying text.

395. See *supra* notes 27, 358–61, 364–67, 376–78 and accompanying text.

396. See generally HOBSON, *supra* note 379, at 8–25, 181–214 (describing Marshall's illustrious judicial career); POWE, *supra* note 33, at 21–462 (detailing Warren's transformation of constitutional law).

397. See *supra* note 33 and accompanying text.

398. 17 U.S. (4 Wheat.) 316 (1819).

399. 347 U.S. 483 (1954).

400. For instance, five Justices held that the Constitution's privilege of the writ of habeas corpus extended to foreign "enemy combatants" who had been captured overseas and were being detained outside of the United States's territorial jurisdiction (in Guantanamo Bay, Cuba). See *Boumediene v. Bush*, 553 U.S. 723 (2008). Chief Justice Roberts and Justices Scalia, Thomas, and Alito argued that this decision was unprecedented. *Id.* at 834, 838 n.4, 842, 850. Indeed, the Court's ruling contradicted several hundred years of Anglo-American law, and thus can most plausibly be explained as the majority Justices' policy dispute with an unpopular President, George W. Bush. See Robert J. Pushaw, Jr., *Creating Legal Rights for Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?*, 84 NOTRE DAME L. REV.

Likewise, the liberal Justices consistently oppose the conservatives' attempts to limit the federal judiciary's Article III jurisdiction, particularly in standing cases.⁴⁰¹ Individual rights decisions feature similar political and ideological fragmentation. Perhaps the best illustration is *Stenberg v. Carhart*,⁴⁰² which generated eight separate opinions about whether state bans on partial-birth abortion violated Fourteenth Amendment Due Process liberty and privacy rights.⁴⁰³

Such cases create the impression that "the Court" is not expounding "the law" of the Constitution, but rather that nine Justices are expressing their personal opinions and reading them into the Constitution.⁴⁰⁴ Such individualistic decisionmaking is perhaps the inevitable result of the unwillingness or inability of the Justices (even the professed "originalists") to seriously engage the Constitution's text, structure, underlying political theory, drafting and ratification history, and early implementing practice and precedent.⁴⁰⁵ Instead, the Justices exercise discretion to create doctrines that have little basis in the actual Constitution (and that typically feature vague standards) and then apply them to the facts and circumstances of each case, influenced at least subconsciously by political and ideological factors.⁴⁰⁶

The Court's application of a discretionary and politicized common law approach to constitutional law will continue to harm its institutional reputation. The Court could begin to repair the damage by adopting an apolitical methodology, such as Neo-Federalism, that yields legal rules which are truly rooted in the Constitution—and that would probably work better in practice than the doctrines the Court has fabricated.⁴⁰⁷ I

1975 (2009).

Boumediene arose only because Congress had overturned *Rasul v. Bush*, 542 U.S. 466 (2004), in which the Court creatively interpreted the federal habeas corpus statute as extending to aliens imprisoned beyond America's borders (in Guantanamo Bay)—a holding that mangled that law's text and precedent, as four dissenting Justices demonstrated. See Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1048–58 (2007) (citing the relevant statutes and judicial opinions). Similarly, in 2006, Congress swiftly reversed the same five Justices' remarkably strained reading of another federal statute, which appeared to have repealed the Court's appellate jurisdiction over Guantanamo Bay detainees and to have authorized the President to try them by military commissions, as not doing either of these things. See *id.* at 1058–78 (discussing the cases, congressional acts, and commentaries).

401. See Robert J. Pushaw, Jr., *Limiting Article III Standing to "Accidental" Plaintiffs: Lessons from Environmental and Animal Law Cases*, 45 GA. L. REV. 1, 3–17, 34–53 (2010) (summarizing and analyzing modern standing decisions).

402. 530 U.S. 914 (2000).

403. See Pushaw, *supra* note 34, at 551–60 (examining these opinions).

404. See *id.* at 520.

405. See *id.* at 520–21, 528–29, 577, 590–91.

406. See *id.* at 520–29, 577–91.

407. See *id.* at 529; see also Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 26 (2000) (arguing that the actual Constitution is invariably more insightful and

recognize, of course, that human nature will make the Justices reluctant to give up the vast discretion they have conferred upon themselves. Nonetheless, if the Court continues its freewheeling politicized approach to constitutional law, its members cannot very well complain when elected officials, commentators, and citizens treat the Court like a political rather than legal institution.

CONCLUSION

It is too early to tell what lasting effect *National Federation* will have on the Court's constitutional jurisprudence or institutional reputation. What is clear, however, is that Chief Justice Roberts missed a singular opportunity to issue a transformative opinion that would actually (and not merely rhetorically) have limited Congress to its enumerated powers and protected the states' reserved powers. Instead, the Chief Justice's late switch produced a bizarre result in which the Court finally imposed genuine restrictions on the Commerce, Necessary and Proper, and Spending Clauses, but nullified that effort by allowing Congress to get its way under the Taxing Power. Chief Justice Roberts's refusal to "cross the Rubicon" in *National Federation* may ultimately signal that the traditional Federalism Principle is alive in theory, but dead in practice.

sensible than the Court's elaborate doctrine interpreting the document).